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No.

In The
Supreme Court of the United States

October Term, 1994

ALISON E. CLAPP,

Petitioner,

-against-

LeBOEUF, LAMB, LEIBY & MacRAE, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF THE
STATE OF NEW YORK

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

Do not Fourteenth Amendment Due Process and Equal Protection guarantees assure to a partner in a national legal partnership preclusion from termination of partnership interests, together with injury to reputation and professional occupation, "at will"?

II.

Do not Fourteenth Amendment Due Process and Equal Protection guarantees require enforcement of statutory and case law mandated public proceedings establishing "for cause", prior to termination of partnership interests at a national law firm?

III.

Did not the proceedings in the State court fail to satisfy elemental Due Process and Equal Protection assurances because grounded upon summary judgment application upon the pleadings to all claims upon a complete discovery stay, notwithstanding absence of all evidence of any LLL&M dissolution, indeed, all proof clearly and convincingly evidencing sham defense?

PARTIES

The names of all the parties to the proceeding in the Court whose judgment is sought to be reviewed are as follows:

ALISON E. CLAPP,
Petitioner,

v.

LeBOEUF, LAMB, LEIBY & MacRAE; DONALD J. GREENE, DONALD J. GREENE, P.C., TAYLOR R. BRIGGS, TAYLOR R. BRIGGS, P.C., ALAN M. BERMAN, GEOFFRY D.C. BEST, DAVID P. BICKS, DAVID P. BICKS, P.C., CHARLES W. HAVENS, III, CHARLES W. HAVENS, III, P.C., DOUGLAS W. HAWES, DOUGLAS W. HAWES, P.C., CARL D. HOBELMAN, CARL D. HOBELMAN, CHARTERED, JAMES F. JOHNSON, IV, RONALD D. JONES, RONALD D. JONES, P.C., GRANT S. LEWIS, GRANT S. LEWIS, P.C., CAMERON F. MacRAE, III, CAMERON F. MacRAE, III, P.C., SAMUEL M. SUGDEN, SAMUEL M. SUGDEN, P.C., COLLECTIVELY, A/K/A "THE LeBOEUF, LAMB, LEIBY & MacRAE ADMINISTRATIVE COMMITTEE"; RICHARD M. BERMAN, RICHARD C. COLE, ROBERT A.N. CUDD, CECILIA KEMPLER, PETER R. O'FLINN, FREDERICK B. LACEY, COLLECTIVELY, A/K/A "THE LeBOEUF, LAMB, LEIBY & MacRAE COUNCIL"; IRVING MOSKOVITZ, PETER N. SCHILLER, JOHN A. YOUNG, COLLECTIVELY A/K/A "THE MOSCOVITZ GROUP"; JOHN W. WEBER; MOLLY S. BOAST; PAUL R. STUKEN; JOHN C. RICHARDSON and JOHN C. RICHARDSON, P.C.,

Respondents.

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

OPINIONS BELOW

The opinion of the New York State Supreme Court, New York County officially is not reported and appears in appendix ("**App**") A at 1a, (the "**Lebedeff Ruling**"). The opinion of the New York State Supreme Court, Appellate Division, First Department (the "**Appellate Division**") which affirmed the Lebedeff Ruling officially is not reported but unofficially appears as *Clapp v. LeBoeuf, Lamb, Leiby & MacRae*, 592 N.Y.S.2d 580 (A.D. 1, 1992) and appears in App B at 9a.

JURISDICTION

The judgment of the Supreme Court, New York County, was entered on March 18, 1992, and appears in App G at 16a. AEC's motion for discretionary review pursuant to N.Y. Civ. Prac. L.& R. 5602(a)(1)(i) was denied by order of the Appellate Division on April 8, 1993. (App C at 11a). AEC's appeal as of right to the

New York State Court of Appeals (the "**Court of Appeals**") pursuant to N.Y. Civ. Prac. L. & R. 5601(b)(1) (McKinney 1978) was dismissed by that Court *sua sponte* on May 6, 1993, upon the "ground that no substantial constitutional question is directly involved". (App D at 13a). AEC's motion to the Court of Appeals for discretionary review pursuant to N.Y. Civ. Prac. L. & R. 5602(a)(1)(i) was denied by the Court of Appeals on June 21, 1994. (App E at 14a). AEC's motion for re-argument of the motion for discretionary review pursuant to N.Y. Civ. Prac. L. & R. 5602(a)(1)(i) and Court of Appeals Rules of Practice, Rule 500.11(g) was denied by the Court of Appeals on September 1, 1994. (App F at 15a). In accordance with Rule 13.1 and 13.4 of this Court, this petition is filed within 90 days of the date of denial of rehearing of the motion for discretionary review ("leave to appeal"). The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a) because the judgment of the Court of Appeals sought to be reviewed (i) draws into question the validity of a statute of a State on the ground of its being repugnant to the Constitution of the United States and, also (ii) a right and privilege is claimed under the Constitution or statutes of the United States.

CONSTITUTIONAL, STATUTORY AND RULE PROVISIONS INVOLVED

As outlined in the Appendices, the following provisions are involved: U.S. Constitution, Fourteenth Amendment; McKinney's Consolidated Laws of New York, §§62, 63, 69, 80-81 (the "***Partnership Law***"); and N.Y. Civ. Prac. L. & R. §§2219, 3212 and 3214.

STATEMENT OF THE CASE

First Federal Action

On March 13, 1990, AEC commenced an action against LLL&M grounded upon Title 29 U.S.C. §1132, *et seq.* ("*ERISA*") and amended claims grounded upon Title 18 U.S.C. §1961 ("*RICO*") in the United States District Court (S.D.N.Y.) entitled *Clapp v. Greene, et al.*, 90 Civ. 1690 (RPP) (the "**First Federal Action**"). By Opinion dated August 29, 1990, the court dismissed

the Federal claims pursuant to R. 12(b)(6) upon the pleadings - notwithstanding LLL&M conceded and Federal procedural rule mandated R. 56 conversion to summary judgment standard. Thereupon, the court declined to exercise pendent jurisdiction over *fifteen (15) related State claims*, particularly partnership claims (the "**State Claims**").[1] *Seven (7) months later*, i.e., on March 15, 1991 - two (2) weeks subsequent to AEC's March 1, 1991, reply brief submission - oral argument of AEC's appeal was heard by the United States Court of Appeals for the Second Circuit (the "**Circuit**").[2] Two (2) weeks later, on March 29, 1991, by summary order (the "*Summary Order*") the Circuit affirmed the

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[1]The First Federal Action officially is reported at *Clapp v. Greene*, 743 F.Supp. 273 (S.D.N.Y. 1990), *aff'd* 930 F.2d 916 (2nd Cir. 1991), *cert. denied* __ *U.S.* __ *(1991)* ("**First Federal Opinion**"). AEC sought relief in the Second Circuit, in particular upon the prior district court's allowance for two (2) LLL&M summary judgment motions ("*Sum J Motion*") upon a sham defense ***against every claim, together with the simultaneous imposition of a complete discovery stay, thirty-seven (37) days after commencement*** of the action, the failure to docket applications for preliminary injunction upon insupportable local rule reference, the adoption of *Trial By Affidavit* contention and impermissible inference in a **Background** which erroneously - and prejudicially - omitted all ERISA-claim-supporting medical facts, together with the grant of a represented dismissal on the pleadings without leave to amend, notwithstanding mandatory conversion to summary judgment apparent upon the face of the First Federal Opinion. The allowance of LLL&M's Sum J Motion under R. 56 *compelled* production from AEC of *all* evidence in support of *all* claims, including all pendent claims; meanwhile, LLL&M was authorized to proceed against *all AEC claims* upon ***memorandum contention for "at will" dissolution*** and upon sparse and conclusory affidavits to the same effect by LLL&M's present and former Chairs. The "form" of dismissal, *i.e.*, represented R. 12(b)(6) dismissal, as well, thereby avoided mandatory preliminary injunction findings/conclusions (R. 52(a)), notwithstanding actual conversion to R. 56 standard.

[2]Prior to the March 15, 1991, calendar call of AEC's appeal to the Circuit, Hon. Jon O. Newman, U.S.C.J., presiding judge, directed that counsel for the parties confer privately relating to any challenge to Judge Newman's participation in the hearing of the appeal grounded upon Judge Newman's announcement at the calendar call that LLL&M had been retained by Judge Newman and had drafted Judge Newman's will. A challenge was not presented, notwithstanding that LLL&M declined to state for the record the length of time that LLL&M had such relationship with Judge Newman.

dismissal, notwithstanding plain error - mandated R. 12(b)(6) and Circuit precedent, *Fonte v. Board of Managers of Continental Towers Condominium*, 848 F.2d 24, 25 (2nd Cir. 1988), conversion to R. 56 summary judgment standard - upon the face of the First Federal Opinion, requiring reversal. The Summary Order misdescribed the record, including misdescription of the oral argument upon the appeal, *viz.*, concerning ERISA-claim-supporting facts, nonetheless Summary Order characterized as "*on appeal circumstances*", rather than *actual* AEC affidavit *facts* "presented to and not excluded" by the district court (R. 12(b)(6)), which had assured ERISA jurisdiction - and reversal.

The misdescription centers upon the district court's and Circuit Court's circumvention of the *central issue* in this dispute - ***one which remains*** - the *absence of all evidence* supporting any LLL&M dissolution, "at will" or otherwise; more, the compelling existence of *all* evidence solely to the contrary, i.e., the clear and convincing evidence of LLL&M's submission of a sham defense, nonetheless, a defense repeatedly ***characterized prejudicially*** by these Federal courts as though "actual". ***Subsequently, the prejudice of these Federal Court erroneous (and otherwise unnecessary) characterizations was transferred into the State Court Action at every level***, thereby, precluding to AEC any fair proceeding in ***any*** forum.

State Court Action

In consequence of this unfair denial to AEC of Federal forum, AEC commenced this action in the Supreme Court of the State of New York, County of New York (the "**State Court Action**"), on July 2, 1991, upon those identified State Claims grounded in equity, particularly seeking specific performance of the LLL&M partnership agreement, injunctive and other remedies, together with request for declaratory relief addressing the status of the LLL&M Partnership, AEC's continuing partnership interests and any Partnership Law §§'s 80-81 authorization for continuing use of the "*LeBoeuf, Lamb, Leiby & MacRae*" partnership *name* (the "Equitable Complaint").

On August 1, 1991, in the First Federal Action, AEC sought review in this Court upon a Petition For Certiorari, No. 91-249

(the "**Petition**").[3] On August 7, 1991, in the State Court Action,

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[3]In the Petition, AEC identified as clearly erroneous and unfair the Circuit's denial to her of a Federal forum grounded upon valid claims. Additionally, AEC asserted that the Circuit had failed to require recusal in consequence of the *prior district court's conduct*, e.g.,

> A. characterization of AEC's pleadings as a "**hold-up**" on March 26, 1990, i.e., thirteen (13) days after commencement in the presence of LLL&M's counsel, immediately prior to the April 16, 1990, submission of LLL&M's Sum J Motion against all fifteen (15) claims virtually exclusively upon a purported "at will" dissolution of the LLL&M entity upon the affidavit contention of Donald J. Greene, LLL&M's Chair ("**Greene**") (Petition, p. 3);
>
> B. statements on June 22, 1990 - *i.e., subsequent to an AEC June 14, 1990, application for preliminary injunction which required R. 52(a) findings/conclusions* - representing understanding "of '**Big Firm' problems**" and urging AEC's abandonment of the legal system, adding that the ERISA litigation, one grounded upon medical distress, could be "long, arduous and ***bad for a party's health***," that the "press would have a field-day with this scandal", and for the ***first time***, urging that AEC retain other "*independent counsel...*" *Id.*;
>
> C. statements on June 29, 1990, at the oral argument upon AEC's preliminary injunction application - notably, subsequent to acknowledgment of absence of any LLL&M "notice of dissolution", and absence of expulsion power in the partnership agreement - that upon LLL&M's Sum J Motion, one which presented a single legal issue, the "at will" defense (characterized by the district court as leaving "**everything up for grabs**") that: "I understand what they have done. They have **continued the Partnership** under the same name with different partners..." Petition, p.4;
>
> D. ***declining*** *on August 8, 1990,* ***to docket*** *AEC's June 14, 1990,* ***preliminary injunction application*** upon grounds of failure in compliance with a local rule which required a contention of urgency, notwithstanding repeated affidavits of urgency and continuing **court-acknowledged**, uncontested, irreparable injury, **Id.**;
>
> E. issuance of the First Federal Opinion on August 29, 1990, representing grant of summary judgment to LLL&M "upon the

AEC sought preliminary injunctive relief, an application required to be decided "within twenty (20) days". CPLR §2219. On August 19, 1991, in the State Court Action - as in the First Federal Action, upon immediate and comprehensive LLL&M

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pleadings" without leave to amend, notwithstanding published, *express reliance upon* prejudicial *Trial By Affidavit* LLL&M affidavits, as well, AEC *affidavits - notably, however, prejudicially omitting all ERISA-claim-supporting medical facts contained in AEC's affidavits - nonetheless, upon the reliance thereby mandatorily converting* the motion to R. 56 standard, and as well, issuance of the First Federal Opinion notwithstanding *prior*, i.e., August 24, 1990, *filing of mandamus application* together with request for voluntary recusal; *Id*; and

F. the addressing of AEC's recusal/preliminary injunction application on October 11, 1990: "I can't grant a preliminary injunction on these papers.... It requires a hearing and what have you.... *You have maybe an equity right that this is a* ***sham dissolution. You maybe quite right...***", adding - but *not* to the *Federal Supplement* published opinion - that the published characterization of AEC as a "former" and "terminated" partner were *not findings*, but rather the "factual situation"; that *AEC's status "could be litigated to a fare-thee-well"*; Petition, p.5.

Under recusal precedent, *e.g.*, most recently, *Liteky v. United States*, Docket No. 92-6921, __ U.S. __, 62 U.S.L.W. 4161 (March 7, 1994), recusal appeared appropriate. However, the Circuit addressed R. 12(b)(6) characterization, rather than "conversion" to R. 56 standard, as well as omitted reference to *Cheng v. GAF Corp.*, 713 F.2d 886, 891-92 (2nd Cir. 1983), *i.e.*, precedent available to correct the prior district court's inappropriate interference with AEC's marital and attorney/client relationships, *see e.g., Board of Regents v. Roth*, 408 U.S. 564, at 571-72, 33 L.Ed.2d 549 (1972) ("[L]iberty...guaranteed... Without doubt, it denotes not merely freedom from bodily restraint but also the *right* of the individual *to contract, to engage in any of the common occupations of life, ...to marry, establish a home and bring up children....*" (emphasis added); nonetheless, the Circuit *continued to approve the appropriateness* of AEC's mandamus procedure and the inappropriateness of the prior district court's conduct. *See Schoenberg v. Shapolsky*, 971 F.2d 926 at 929-35 (2nd Cir. 1992) ("[Attorney] informed the court that *he would seek...mandamus*... ...did not wish to...[but] compelled to do so if the court continued to refuse to entertain...motion to dismiss...[mandamus application] was not undertaken in bad faith...." [*cf.* AEC's *order to show cause* application for preliminary injunction pending for *2½ months*; then *not docketed, supra*, at "D".] On October 7, 1991, this Court denied the Petition.

summary judgment practice and an immediate and complete discovery stay - again, solely upon the same sparse and conclusory affidavit contentions, LLL&M presented the identical defense, i.e., a purported ***"at will" dissolution*** of the LLL&M Partnership, ***as of*** December 31, 1989, with contended "reconstitution" ***as of*** January 1, 1990, however, absent AEC as a continuing partner, rather, identified as a "former partner".

LLL&M submitted this defense notwithstanding conceded absence of §62(d) expulsion power in LLL&M's lengthy, written agreement, conceded failure in application of §63 dissolution proceedings, and the absence of all evidence for compliance with §§'s 80-81, *viz., the statutory authorization, **i.e., license**, for continuing use of LLL&M partnership name solely upon certificate filing and publication.*[4] (App S at 58a). On August 23, 1991, AEC commenced an action upon State Claims grounded in law, alleging particularly breach of the LLL&M partnership agreement and other legal claims (the "Legal Complaint"). On September 19, 1991, the Equitable and Legal Complaints were consolidated before Lebedeff, J. Thereafter, *for the first time in this dispute*, on September 25, 1991, solely by affidavit contention of former Chair, Taylor R. Briggs ("**Briggs**"), LLL&M contended that such "**at will**" dissolutions occurred as **annual "policy" since at least 1981**. Notably, *not* a piece of paper otherwise has been produced from LLL&M concerning this purported defense - nor so required to be produced by any judicial officer in any forum.[5]

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[4]On July 6, 1990, *i.e.*, in the First Federal Action, AEC presented evidence of LLL&M's submission of sham defense, viz., LLL&M's **singular June 22, 1977**, determinative filing in the New York County Clerk's office of a §§80-81 mandated ***"Certificate of Continued Use of Partnership Name of LeBoeuf, Lamb, Leiby & MacRae, ...[address](Pursuantto Article VII of the Partnership Law of the State of New York)" (App V at 63a).***

[5]LLL&M produced the 1986 Partnership Agreement which included AEC as a "Schedule 'A'" listed partner. After AEC's commencement of the First Federal Action (March, 1990), without authority, ***LLL&M deleted AEC's name from "Schedule 'A'"***. LLL&M submitted the 1990 Partnership agreement, dated *as of* January 1, 1990, in support of the "at will" defense. LLL&M has never identified - nor has been required by any judicial officer in any forum so to identify - purportedly who invoked the contended "at will" dissolution(s), i.e., purportedly, *"who, if anyone, **withdrew?***"

Subsequent to an October 2, 1991, conclusion of submissions to Lebedeff, J., which AEC submissions contended "due process" objection (App H at 21a), upon a continuing complete discovery stay, on February 14, 1992, Lebedeff, J. granted summary judgment to LLL&M upon the pleadings, i.e., upon all fourteen (14) causes of action. An order and judgment was entered on March 18, 1992 (collectively, the "**Lebedeff Ruling**"). An appeal was perfected to the Appellate Division, within seven (7) days, i.e., so as to be timely for hearing at the June 1992 Term of the Appellate Division.

However, upon March 27, 1993, application, LLL&M obtained adjournment of AEC's appeal from the June 1992 Term to and until the September 1992 Term. (App I at 22a). Upon the October 2, 1992, oral argument, the Appellate Division declined to address the injury to AEC's reputation and effect upon professional occupation in consequence of LLL&M's conduct, the prejudicial delay in judicial proceedings and the preclusion of all discovery upon all causes of action. On October 14, 1992, AEC presented to the Appellate Division a "Motion for modification...and/or leave to appeal to the Court of Appeals", returnable October 27, 1992, in which, again, AEC presented reliance upon Fourteenth Amendment guarantees of due process, now, also equal protection. (App K at 26a). On December 15, 1992, the Appellate Division affirmed the Lebedeff Ruling, adding, "for the reasons stated by Lebedeff J.". (App B at 10a).

On February 17, 1993, AEC sought both an Appeal of Right to the Court of Appeals (App M at 35a; App P at 42a), as well as appeal by permission to the Court of Appeals through application to the Appellate Division, again, grounded upon Fourteenth Amendment guarantees of due process and equal protection. (App N at 37a). Both applications were denied.[6] (App C at 11a; App

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[6]*See R.J. Reynolds Tobacco Co. v. Durham County*, 479 U.S. 130, 93 L.Ed.2d 449, 107 S.Ct. 499 (1986) (State's highest court's dismissal of appeal upon absence of "substantial constitutional question" is decision on merits which may be reviewed by this Court); *Valz v. Sheepshead Bay Bungalow Corp.*, 249 N.Y. 132, 163 N.E. 124, 127 (Ct. Appeals 1928), *cert. denied*, 278 U.S. 647, 73 L.Ed. 560, 49 S.C.t 82 (1929) ("[W]here the question of whether a judgment is the result of due process is the *decisive* question upon an appeal, the appeal lies to this Court as a matter of right").

D at 13a). Likewise, AEC's motion for discretionary review (App O at 39a) and motion for re-argument (App Q at 50a) were denied by the Court of Appeals (App F at 15a). This Petition follows and is in consequence of these events.[7]

See also, Harris v. Reed, 489 U.S. 255, 103 L.Ed.2d 308, 109 S.Ct. 1038 (1989) (Rule of *Michigan v. Long*, 463 U.S. 1032, 77 L.Ed.2d 1201, 103 S.Ct. 3469 (1982) under which this Court may reach a Federal question on review of State court judgment upon fair showing that state court rested its decision primarily on Federal law, unless "plain statement" that decision rests upon adequate and independent state grounds is satisfied: §§62(1)(d), 63, 80-81 restrictions upon property interests made nugatory by "at will" *alternative*); *Hildwin v. Florida*, 490 U.S. 638, 104 L.Ed.2d 728, 109 S.Ct. 2055 (1989) (no waiver because state appellate court, *e.g.*, the Appellate Division, did not rest decision upon Federal procedural issue, rather, upon denial of merit to claim); and *Jongebloed v. Erie R.R. Co.*, 296 N.Y. 912, 72 N.E.2d 627 (Ct. Appeals, 1947) (notwithstanding absence of constitutional issue at trial, sufficient for Court of Appeals jurisdiction that a "substantial constitutional question was properly presented to the Appellate Division and was necessarily involved in its decision." *Id.* at 628.

[7] ***Second Federal Action***

By Order to Show Cause dated November 29, 1993, in the United States District Court, S.D.N.Y., Civil Action No. 93 Civ. 8084 (SS) (the "**Second Federal Action**"), AEC sought preliminary injunctive and other relief against LLL&M and Appellate Division Justices (the "*Appellate Division*"), *inter alia*, presenting a **general constitutional challenge** to New York Partnership Law Statutes §§'s 62(1)(b), 63, and 80-81, particularly in consequence of the proceedings held in the State Court Action before Lebedeff, J. and the Appellate Division. On December 29, 1993, AEC's application for preliminary injunctive relief was denied - however, as in the First Federal Action - absent R. 52(a) findings/conclusions. By notice of appeal dated January 27, 1994, AEC sought an appeal of the denial of preliminary injunctive relief to the Circuit. (Appeal No. 94-7122). By Order and Opinion dated August 19, 1994, the district court acknowledged absence of "**Rooker/Feldman**" preclusion to jurisdiction, absence of statute of limitation, res judicata and collateral estoppel defenses, nonetheless, dismissing the Second Federal Action upon a judgment entered August 31, 1994, grounded upon R. 12(b)(6) (failure to state a claim), *viz.*, absence of Federally protected property interest, *i.e.*, conduct exempt from all due process restraint and upon absence of LLL&M "state actor" status, *inter alia*, citing, *Board of Regents v. Roth*, 408 U.S. 564 (1972); *Kelly Kare, Ltd. v. O'Rourke*, 930 F.2d 170 (2nd Cir.), *cert. denied*, __ U.S. __, 112 S.Ct. 300 (1991); and *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 102 S.Ct. 2744 (1982). By notice of appeal dated September 27, 1994, AEC sought an appeal to the Circuit (Appeal No. 94-9002). Upon consent dated October 25, 1994, the issues in Appeal No. 94-7122

Consistently, AEC has contended that she remains an LLL&M partner because LLL&M's "at will" defense is both prohibited by law and a sham. AEC has *not* voluntarily or otherwise withdrawn from the LLL&M Partnership and LLL&M admits that the relevant partnership agreement, the 1986 Partnership Agreement (the "**Agreement**"), **does not contain any express expulsion power, indeed, repeatedly, LLL&M concedes that AEC has not been expelled!**" AEC contends that the complete discovery stay upon all causes of action, notwithstanding meritorious, did preclude and was intended to preclude any possibility for AEC's revelation of LLL&M's sham "at will" defense through the prevention of all discovery relating to *any* of the alleged causes of action.

LLL&M's conduct *de facto* has precluded and injured AEC's continuing property and liberty interests in the LLL&M Partnership, as well, precluded AEC's ability to practice her profession and wilfully has injured her reputation. AEC continues to sustain irreparable harm in consequence of the delay in revelation of the sham defense underlying this dispute, one presented by LLL&M in April, 1990, in the First Federal Action, - notwithstanding *R. 56(g) consequence*. AEC, at 38-42 years of age, continues to be precluded from the practice of her profession, continues to be forced into indigence, continues to sustain irreparable harm to her reputation, indeed, ignominy, in consequence of a contrived defense and unrivaled allowance for misuse of summary judgment proceedings and complete discovery stays upon all claims, in all courts.

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were withdrawn, such to be considered upon Appeal No. 94-9002 which is *sub judice*. On August 12, 1994, i.e., seven (7) days prior to the R. 12(b)(6) dismissal of the Second Federal Action, the district court denied AEC's request for an evidentiary hearing relating to the district court's denial of open-court statement on March 31, 1994, that the district court has/had a relationship with Defendant-Appellee, Hon. Diane A. Lebedeff, Acting Justice of the Supreme Court, State of New York, New York County. (App X at 74a).

Concurrently with the filing of this Petition for Certiorari, there is being presented to this Court a motion to adjourn consideration of this Petition until Second Circuit decision upon AEC's Appeal No. 94-9002, so as to provide to AEC, if necessary, a review in this Court of the claims and issues identified in this Petition and/or as identified in Appeal No. 94-9002.

REASONS FOR GRANTING THE WRIT

A. THE FOURTEENTH AMENDMENT DUE PROCESS AND EQUAL PROTECTION CLAUSES DO *NOT* AUTHORIZE DISSOLUTION "AT WILL" AS AN ALTERNATIVE TO EXPRESS EXPULSION POWER, HERE, ADMITTEDLY ABSENT!

Respectfully, this case is of national significance. Notwithstanding a national law partnership's agreement prohibiting "at will" dissolution, excepting in contravention, notwithstanding that partnership's failure in presentation of any evidence for any dissolution "at will" or otherwise, any acceptance of LLL&M's "at will" defense as an "alternative" to admittedly absent express expulsion power irretrievably would make nugatory - nationally - most partnership law provisions and principles. Of equal significance, particularly in context of §63, is the unexplained absence from all reported record of the sole and actual defense presented, LLL&M's unprecedented reliance upon a contended "at will" dissolution to support a "moving on" without an individual partner at an institutional, national law firm by fiat of that continuing firm's leadership. Indisputably, however, unconstitutionally, throughout this time - absent all judicial relief - LLL&M has finessed the avoidance of summary judgment in favor of AEC in consequence of a *de facto* expulsion: LLL&M admits the absence of expulsion power in the Agreement, however, contends a Constitutional *statutory* "alternative" - an after-commencement-of-litigation contention for "at will" dissolution, notwithstanding §§ 62(d) and 63 due process (and equal protection) statutory limitations, those, thereby made nugatory.[8] Nonetheless, "at will" dissolution should *not* be an

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[8] *See Allen v. McCurry*, 449 U.S. 90, 100, 101 S.Ct. 411, 418 (1980): [I]n *Monroe v. Pape* [365 U.S. 167, 183, 5 L.Ed.2d 49 (1961)]... the Court inferred that Congress had intended a federal remedy in three circumstances: where state substantive law was facially unconstitutional, where state procedural law was inadequate to allow full litigation of a constitutional claim, and where state procedural law, though adequate in theory, was inadequate in practice... In

"alternative" - such dissolution addresses "**withdrawal**", an event, here not evidenced; more, a self-help remedy which extinguishes all AEC liberty and property interests in the LLL&M partnership notwithstanding absent all statutory (and case law) due process restriction. Undoubtedly, there must exist a fundamental right that *termination* of professional occupation and partnership interests in a legal partnership - more, at a national law firm - *may not "at will" so be accomplished*; indeed, so nationally state legislatures have enacted "due process" §62(1)(d) express expulsion provisions and §63 "for cause" provisions.[9] More, since "at will" dissolution expressly has been *prohibited* in the Agreement, any "at will" dissolution, if actual, would be in contravention to the Agreement's stated intent, thereupon, imposing statutorily mandated adverse

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> short, the federal courts could step in where the state courts were unable or unwilling to protect federal rights....

[9]*See Motor Vehicle Board v. Orrin W. Fox Co.*, 434 U.S. 1345, 54 L.Ed.2d 439, 98 S.Ct. 359 (1977) (*Core area* of liberty under the Fourteenth Amendment to engage in a gainful occupation that *arbitrarily* may not be denied by the State), *Examining Board v. Flores de Otero*, 426 U.S. 572, 49 L.Ed.2d 65, 96 S.Ct. 2264 (1976) ("[R]ight to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure... [quoting *Truax v. Raich*, 239 U.S. 33, 41, 60 L.Ed. 131, 36 S.Ct. 7 (1915)]; *Greene v. McElroy*, 360 U.S. 474, 3 L.Ed.2d 1377, 79 S.Ct. 1400 (1959) ("[R]ight to follow a chosen profes*sion free from unreasonable government interference" comes within liberty/property interests [Fifth Amendment]); see also Reno v. Flores*, __U.S.__, 123 L.Ed.2d 1, (1993) and *R.R. Village Ass'n., Inc. v. Denver Sewer Corp.*, 826 F.2d 1197, 1201, (2nd Cir. 1987):

> Property interests are created, and their dimensions defined, by state law. *See Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 538, 105 S.Ct. 1487, 1491, 84 L.Ed.2d 494 (1985). Whether a state-created interest amounts to a property right of which the holder may not be deprived without procedural due process is a question of federal constitutional law. *See Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 9, 98 S.Ct. 1554, 1560, 56 L.Ed.2d 30 (1978). A state-created entitlement that cannot properly be eliminated except for cause is a property right of which the holder may not be deprived without procedural due process....

As stated in *Del's Big Saver Foods, Inc. v. Carpenter Cook, Inc.*, 795 F.2d 1344 at 1346 (7th Cir. 1986): "A state cannot avoid its obligations under the due process clause by delegating to private persons the authority to deprive people of their property without due process of law."

consequence upon any wrongfully dissolving partner. In all events, there is absent all reality - because absent all evidence - of any dissolution of the "Firm", "at will" or otherwise, i.e., of the LLL&M entity which since 1986 has included AEC as a partner upon "Schedule 'A''s" listing of the membership. Further, there has continued unfair, unprecedented and due process violative applications of summary judgment upon all pleadings, together with preclusion of *all* discovery upon all causes of action, precluding - and intending to preclude - any revelation of LLL&M's sham defense through discovery upon AEC's other causes of action.

B: DISSOLUTION "AT WILL" IS A RIGHT WHICH MAY AUTHORIZE *WITHDRAWAL* BY A PARTNER UPON EVIDENCE OF SUCH EVENT, NOT AUTHORITY FOR SELF-HELP EXPULSION OF *ANOTHER* PARTNER

Invariably, precedent addressing partner expulsion does so in the context of a *written* expulsion provision.[10] LLL&M's reliance upon §62(1)(b) "at will" dissolution misstates both the principle and its rationale. Constitutionally, "at will" dissolution is intended to authorize "**withdrawal**". A partner [but *not* 132] who chooses legitimately to "withdraw" may not be compelled to continue in the partnership. A resulting "dissolution" is not "in contravention of the agreement", i.e., not a §62(2) breach, so to the withdrawing partner not an act with adverse consequence. A dissolution "at will" is authorized and substantively implemented so as to accomplish notice of that (now, former) partner's termination of obligation to the firm and to third-parties "through" the firm. This

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[10]*See e.g., Gelder Medical Group v. Webber*, 41 N.Y.2d 680, 394 N.Y.S.2d 867 (Ct.App., 1977). Thus,

> ***Partners have no common law or statutory right to expel or dismiss another partner from a partnership. They may, however, provide in their partnership agreement for expulsion under prescribed conditions which must be strictly applied.*** *Millet v. Slocum*, 167 NYS2d 136 (AD 4 Dept., 1957), aff'd 5 NY2d 734, 177 NYS2d 716 (Ct.App., 1958). (Emphasis added).

rational purpose has not been and should not now be subverted through contended "at will" dissolution(s) into a contrivance for concealment of due process denied and equal protection violative *de facto expulsion(s)*, prohibited in the absence of express expulsion power contained in an agreement. LLL&M's reliance upon §62(1)(b) is invalid since such subverts and **makes nugatory §62(1)(d) and §63** and makes irrelevant numerous other partnership provisions, e.g., §§'s 61, 65-69, 71-72, 74-75.

LLL&M has acted without authority in representing an "alternative" to admittedly absent express expulsion power. Thus, pursuant to *§62(2)*, LLL&M has acted illegally, has represented a dissolution in breach of its own agreement.[11] In the absence of express expulsion power, a power to withdraw has never before and should not now become a pretext for accomplishing that which this Agreement neither contemplated nor included, a power to expel.[12] In *Wyatt v. Cole*, 504 U.S.__, 118 L.Ed.2d 504, 509-10, 112 S.Ct. __ (1992), this Court reviewed these facts:

> This dispute arises out of a soured cattle partnership.... [R]espondent...Cole *sought to dissolve his partnership* with petitioner...Wyatt. *When no agreement could be reached*, Cole...filed a state court complaint *in replevin* against Wyatt .... (Emphasis added.)

Obviously, Cole, like LLL&M, and like this Court in *Wyatt*,

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[11]*See Bromberg and Ribstein on Partnership*, Chap. 7, "Dissolution and Winding Up of Partnership" (1988).

[12]*See, e.g., The Partnership Handbook*, New York State Bar Association 1986, Chap. 1, "The General Partnership", which addresses the "at will" principle and actual dissolution indicia and consequence (R. 813-48):

> "1. *Dissolution by an Act of a Partner*: "Any Partner may **withdraw** from a partnership 'at will' at any time, thereby dissolving it... (p14).
>
> 2. *Dissolution by an Act of a Partner In Violation of the Partnership Agreement*: A partner always has the power to **withdraw** from a Partnership, thereby causing its dissolution, for the law will not compel anyone to act as the partner of another...." (p15) (R. 832-33). (Emphasis added).

remained unaware that *according to LLL&M*, an *invincible* remedy had been available as an alternative which would have compelled avoidance of all concern for precedent strictly limiting pre-judgment remedies, e.g., *see Fuentes v. Shevin*, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed. 556 (1972). Indeed, according to LLL&M, the "at will" principle should have precluded review of *Wyatt* by this Court, indeed, should have precluded review by the district court concerning the *Wyatt* two-person partnership dispute. Now, in consequence of any acceptance of LLL&M's contention for an invincible "at will" principle, heretofore settled Partnership Law statutes, e.g., §§62(1)(d), 63 and 80-81, have been held not to apply: the "at will" principle, to the exclusion of all other law, has assured LLL&M a legal, complete, and silent extinguishment of AEC's - or any other partner's interests - at any time, for any or no reason and all without any disclosure.[13] The ineluctable consequence of any legitimacy given to the "at will" principle, as contended by LLL&M, at least, is the simultaneous making of *Wyatt* both irrelevant and superfluous.[14]

Does the Partnership Law provide such nugatory provision as requirement for §62(1)(d) **express expulsion power "strictly applied" *(Millet v. Slocum)*** if an "alternative" in the manner contended by LLL&M were legitimate? Is anarchy to replace partnership fiduciary duty as one partner "at will's" another, the partnership "re-constituted" *ad infinitum*, with professional and business reputations, partnership property and liberty interests "at will" destroyed, firm and individual assets at will "available" to the earliest or most ruthless in reliance upon such unbridled "right", indeed, third-party and governmental interests silently altered,

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[13]Indeed, in the words of LLL&M's counsel, "They [LLL&M] could tell her to leave if she wore the wrong color dress." (R 352, in First Federal Action.)

[14]Indeed, *absence of requirement* for enforcement of any §63 "for cause" hearing in context of pre-judgment remedies is a *decisive* factor in determining Fourteenth Amendment validity. *Connecticut v. Doehr*, 501 U.S. 1, 115 L.Ed.2d 1, 111 S.Ct. 2105 (1991).

indeed, "at will"?[15] No partner (no partnership) "assumes the risk" of such irrationality. Simply, the "defense" is an absurdity, contrary to the obvious, actual purpose for which legitimate "at will" dissolution was intended - i.e., the civilized "withdrawal" of a partner - but not 132 - who thereupon may not be held hostage to a firm she/he no longer wants, thus, publicly establishing rights and obligations in consequence of the changed relationship.

Have all litigants who have contested the validity and fairness of express expulsion provisions overlooked LLL&M's invincible defense? Have all courts - nationally - in addressing a legion of Uniform Partnership Act expulsion clause (and "dissolution") cases been so lax not to have understood that such litigation need not have been commenced, need not have been appealed, that LLL&M's "alternative" ended all requirement for ruling?[16] Should all Federal and State statutes governing race,

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[15]Fourteenth Amendment applied because restrictive *purposes* of the agreement were secured *solely* through State judicial enforcement. *Shelley v. Kraemer*, 334 U.S. 1, 92 L.Ed. 1161, 68 S.Ct. 836 (1948).

[16]*See Edmondson v. Leesville Concrete*, 500 U.S. 614, 114 L.Ed.2d 660, 111 S.Ct. 2077 (1991) and *National Collegiate Athletic Asso. v. Tarkanian*, 488 U.S. 179, 102 L.Ed.2d 469, 109 S.Ct. 454 (1988): here, State has provided a *mantle of authority* to LLL&M enhancing LLL&M's power to cause harm, *inter alia*, because: (i) LLL&M could not exercise "at will" dissolution *de facto* to expel absent the overt significant assistance of the State courts, indeed, a State created legal framework governing LLL&M's conduct upon which LLL&M relied and acted, *viz.*, § 62(1)(b) "at will" dissolution, more, (ii) LLL&M received all assistance and benefit from the State's non-enforcement of §§ 62(1)(d), 63 and 80-81, indeed, continued *prohibited* use of partnership name notwithstanding *court-filed* and judicial monitored written evidence of sham defense, (iii) these judicial authorities - according to LLL&M's "at will" contentions - *must* enforce such *de facto* expulsion; (iv) thus, the State has delegated to LLL&M - "at will" - the State's authority purportedly to "re-constitute" or "reformulate" absent all evidence for any "*actual*" event, *i.e.*, LLL&M has performed a traditionally governmental function; and (v) AEC's injury was aggravated in a unique way by LLL&M's absence of *public "for cause"* justification for interference with AEC's property, profession and reputation. *Cf. Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 42 L.Ed.2d 477, 95 S.Ct. 449 (1974), (no state action by private utility because State regulatory commission did not put *its own weight* on the side of the proposed practice by ordering it) and *Evans v. Newton*, 382 U.S. 296, 15 L.Ed.2d 373, 86 S.Ct. 486 (1966) (individual entrepreneur a *State actor* when endowed by State with powers or functions governmental in nature).

creed, gender and other forms of discrimination concerning "associate" attorneys so be undermined through an LLL&M or other "firm" momentary "advance to partnership", soon followed by an "at will" charade as here perpetrated, undoubtedly after the expiration of prescriptive period(s) for civil rights actions? No partner, no society "assumes such risk"; no agreement, no statute authorizes such irrationality. Nonetheless, this, the inevitable consequence of subverting the "at will" withdrawal principle into an "at will" "expulsion" principle; this, the inevitable consequence of adopting LLL&M's "alternative".

In rational contradiction to LLL&M's contention for replacement of fiduciary duty with "at will" chaos, the Partnership Law requires that expulsion be express and so strictly be construed. In the absence of express expulsion power, a real "alternative", §63, is provided to assure civilized ***due process*** procedures and ***equal protection*** assurances for disgruntled partners - a balanced mechanism for fair resolution of conflicting interests. Absent express expulsion power, LLL&M's remedy should not have been self-help, but §63 remedy; absent express expulsion power, AEC's interests should not have been made subject to LLL&M compulsion, rather, §63 due process and equal protection. Here, the facts do not support LLL&M's represented impervious "right" to dissolve "at will", purportedly to succeed to - or otherwise interfere with - AEC's property and liberty interests concerning the "former firm" without consequence. LLL&M purports dissolution "at will", nonetheless, absent all semblance of liquidation, indeed, absent all semblance of dissolution!

LLL&M's contention for a "policy" of dissolutions (R. 1026-29) was insufficient to raise any triable issue of fact because (i) such purported "policy" should not supplant an express agreement which prohibits that very "policy" (R. 84), and because (ii) LLL&M failed upon *its* burden of proof upon *its* defense. (R. 1072-77). In truth, a partnership "at will" may *not* be dissolved at any time without consequence, e.g., (i) not when the purported dissolution is an unconstitutional contrivance implementing self-help so as to avoid summary judgment because absent § 62(1)(d) express expulsion power or §63 reliance, (ii) not when "at will" dissolution is prohibited in the agreement, and (iii) not when not a "dissolution", but rather a hoax because the "dissolving partner(s)" remain, have not "withdrawn" from "the Firm".

C: LLL&M'S AGREEMENT PRECLUDES "AT WILL" DISSOLUTION: THE DEFENSE, A SHAM

LLL&M's represented "dissolution at will" is an act or condition precluded by the Agreement.[17] Thus, the Agreement establishes: (i) a "partnership" or "**the firm**"; (ii) for a **term** which shall be indefinite; (iii) **the firm** shall continue until the **completion of any winding up; and (iv) notwithstanding,**

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[17]In pertinent part, the Agreement states:

1. Term; Membership; Etc.
(a) Term. The **term** of the partnership represented by the firm shall be **indefinite**, and **the firm shall continue** until the completion of any winding up of the partnership affairs of the firm. It is the **intent** of this Agreement that, **notwithstanding** (i) the **death** or **retirement** of a partner, or...**withdrawal**... or **admission**...or (ii) **any other act** or condition, **not in contravention of the terms of this Agreement, that by operation of law, might constitute a dissolution of the partnership** represented by **the firm**, ***the firm shall continue*** as a law partnership, whether pursuant to appropriate amendments of this Agreement or by other consensual arrangements.

For the purpose of effectuating the foregoing and to the full extent... enforceable...each of the partners hereby **waives...in connection with** his or any other partner's **death, retirement or withdrawal, or any other act or condition that, by operation of law, might constitute a dissolution**, to (x) wind up the partnership...(y)...or (z) secure a formal accounting of his interest in the firm.

(b) ***Membership***. The members of the firm on the date of this Agreement (January 1, 1986) ***are those individuals*** and professional corporations ***named in Schedule A. The members of the firm at any time after the date of this Agreement shall be those individuals*** and professional corporations ***so named*** in Schedule A, together with those individuals and professional corporations who shall have been admitted as partners in the firm, ***and, in each case, whose membership in the firm shall not have ceased, whether by reason of death, retirement or withdrawal of such partner from the firm.***

(c) ***Notice of Withdrawal***. Any partner in the firm may withdraw from the firm by giving not less than 90 days' prior notice in writing of his intended withdrawal.... (R. 585(b)-(d)). (Emphasis added).

> a) death, b) retirement, c) withdrawal, d) admission, or e) **any** other act or condition **not in contravention**...that by operation of law might constitute a dissolution of the partnership...[e.g. a represented **"at will dissolution"** contended by Greene and Briggs to have occurred], ***the firm*** [i.e. that entity (or aggregate)],

(v) ***shall continue***... by ***consensual arrangements***, and [***only***] (vi) for the purpose of ***the firm*** so continuing by "consensual arrangement" - notwithstanding "death, retirement, admission, [or] withdrawal" - but ***not*** expressly prohibited "at will" dissolution - a waiver "effectuating the foregoing" stated intent, may become effective; and (vii) ***"Schedule A" listed members*** of "***the firm***", ***e.g., AEC***, "shall be those individuals...so named... whose membership ***shall not have ceased...by death, retirement or withdrawal***...".

Predictably, the Agreement contemplates a consensual change in "membership" to accomplish a change in partnership status, not a "dissolution" - at will or otherwise. The Agreement states that only upon "death, retirement or withdrawal" - i.e., *not* for "any reason" as Greene contends - does any "Schedule'A'" named partner, e.g., AEC, at any time thereafter cease in partnership membership (R. 494, 585y). Deliberately, the Agreement makes unnecessary the formation of a "new" entity to replace "***the Firm***" upon the occurrence of any event listed at (iv) a-e, *supra*, including any represented "at will dissolution", an act (or condition) then and now **precluded to cause *the Firm* not to continue**.

Who, if anyone, has withdrawn from the "firm"; who, if anyone, by "consensual arrangement" purportedly is no longer a "member" of the "the firm" - excepting AEC? Indisputably, AEC's "Schedule 'A'" membership has *not* been discontinued through her "death, retirement or withdrawal".[18] LLL&M's

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[18]Indisputably, LLL&M **"contracted-out"** that an "at will" dissolution could (or would) cause a dissolution - except in contravention. (R. 1057). *Odette Realty Co. v. Di Bianco*, 565 N.Y.S.2d 815, 816 (A.D. 1, 1991) (*Dissolution prohibited* because:

contention for a diametrically contradictory "policy", indeed, "annually", remains a hoax.[19] LLL&M drafted into its agreement *an express barrier* to an individual partner or more likely group of partners who might otherwise attempt to impose the significant disruption of an actual "at will" dissolution upon *the Firm*, *viz.*, a "palace revolt," undoubtedly against LLL&M's management. Theoretically, a **§62(2)** "at will" dissolution would remain available under the Agreement. However, since by Agreement expressly stated to be "in contravention", such dissolution would be in bad faith, would be in breach of fiduciary duty, would be a **§62(2)** dissolution *in breach*. If effective, i.e., if substantively implemented by a partner's "withdrawal" - not the end-run around the statute here evidenced - significant **§69(2)** consequence would be imposed statutorily against the wrongfully dissolving partner(s), e.g., breach of contract damage claims and prohibition from participation in any continued business "**in the same name**" carried on by the non-breaching partners. As self-interestedly, LLL&M has stated its intent to preclude "at will" dissolution, LLL&M's present reliance upon such defense is more than meritless: rather, a four (4) year subversion of §62(d) expulsion power, here admittedly absent and four (4) year imposition of predictable, severe adverse consequence and stigma upon AEC, who throughout has been nothing more than the blameless victim of Greene's and Briggs's fiat for "10% partner reduction". R 885.

The represented dissolution is absent all notice, is absent *all evidence of knowledge* of the *Firm membership* that a dissolution has taken place; indeed, purportedly takes place "annually", as "policy". (R. 1026-29). AEC rebuts any contention for "involuntary departure". (R. 716-23, etc.). More, there is absent all evidence to support any such "policy", one which purports to replace LLL&M's express agreement. (R. 369-71, etc.). Likewise, there is absent all evidence that a

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"[N]either...withdrawal...resulted in the... dissolution...where the...partnership agreement **specifically** provided that neither the death nor withdrawal of any partner would effect a dissolution...".

[19]New York precedent, *Clark v. Gunn*, 134 N.Y.S.2d 206, at 207 (Sup.Ct. Westch. Co., 1954), has rejected LLL&M's wilful act of self-help, instead, requiring a §63 statutory dissolution in order to "oust" a partner.

"reconstitution" takes place involuntarily "dropping some partners". (R. 79-84, etc.). More, the represented dissolution(s) is (are) absent any "winding-up", indeed, **all compliance with §§'s 80-81's statutorily mandated filing and publication requirements purportedly "waived"** by an LLL&M "consensual arrangement". Upon compliance with §§'s 69, 80 and 81, a "new firm" may succeed to the "business" and name of the former firm, but *not* otherwise. Since dissolution "at will" has been prohibited, any partner implementing an actual "at will" dissolution would be precluded from continuation in the "business" of "the firm" (§69), and would be prohibited from continuing in the use of the *LeBoeuf, Lamb, Leiby & MacRae* name. Nonetheless, absent §§ 80-81 compliance "since 1981 and earlier", LLL&M continues in use of the LLL&M name and so has been authorized to continue notwithstanding AEC's application for prohibitory injunction.

Undoubtedly, partners are fiduciaries; law partners more so under legal canons. It is apparent that LLL&M's Admin. Comm. having mismanaged LLL&M, but not to their own personal disadvantage, having chosen **to "find other places for about 10 percent" of their partners** (R 397, etc.) - notably, not other "places" for themselves - chose a course for unauthorized, self-help-implemented, due process and equal protection denied, represented expulsion, *not* "dissolution".

LLL&M concocted the "at will" scheme after the commencement of suit (in the "First Federal Action") since otherwise unable to submit any defense. Did 132 LLL&M partners or even one "at will dissolve"..."***as of*** December 31, 1989, and a new partnership formed" ***as of*** January 1, 1990, which ***is identical to the entity existing 1986-1989, absent consensual changes, excepting for AEC?*** (R. 501). In fact, are 132 LLL&M partners or even one other than Briggs and Greene, aware that *after the commencement of litigation*, AEC's name was deleted from signature pages circulated to other members at the direction of Briggs and Greene? Repeatedly, LLL&M has repudiated all interest in submission of evidence concerning under what format, under what terms and conditions the purported transfer(s) between

the Firm(s) and the **"new" entity**(s) has taken place.[20]

LLL&M has failed to submit *any* evidence demonstrating mandatory compliance with notice of the purported dissolutions to *anyone* - not to *any* government interest, not to any creditor or third-party, not to any client, not to each other, indeed, not to AEC! LLL&M postulates that imagining a "dissolution" makes it effective, i.e., satisfies the law's purpose in requiring the demonstration of such event's reality since of significant legal, economic and societal importance. However, dissolution "at will" was *not* intended as a daily, weekly, or yearly occurrence - "dissolution" was intended to be the exception, not the rule, surely, not the "policy". LLL&M's boot-strap contention for "notice" of dissolution through letters sent *exclusively* to AEC, which fail to mention dissolution, is demonstrative of sham. (R. 1055). Dissolution is *never* mentioned by any LLL&M member until the post-commencement-of-litigation, April, 1990, submission in the First Federal Action of LLL&M's Sum J Motion; the

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[20]LLL&M has rejected all opportunity to identify arrangements made by "continuation agreement(s)", "liquidation agreement(s)", or otherwise, to accomplish resolution of *actual* dissolution concerns, e.g., upon the purported "at will" dissolutions since "1981 and earlier", where are the sets of books so recording these events, and what have been LLL&M's arrangements for:

i. manner of transfer(s) of assets and liabilities;
ii. effect(s) upon executory agreements, leases, contracts, loans, particularly bank loans (e.g., "default" provisions);
iii. effect(s) upon financial statements, accounts receivable and accounts payable;
iv. effect(s) upon insurances, particularly malpractice coverage;
v. effect(s) upon negotiable instruments;
vi. effect(s) upon work in progress, particularly litigation;
vii. notices to/acknowledgments by creditors;,
viii. satisfaction(s) of governmental and/or administrative requirements, e.g., *Appellate Division* "DR9-102": *D-Required Bookkeeping Records; G-"Dissolution of a Firm" (App W at 73a)*); and employer liabilities to employees;
ix. notice(s) to third parties, including former clients of the firm(s);
x. tax effects (e.g., holding periods, basis adjustments and IRS entity documentation);
xi. novations, discharges, or indemnity agreements; and
xii. post-dissolution(s) consequences, e.g., "new" partner(s) status concerning pre-dissolution(s) events.

"annual" dissolution as "policy" contention is not mentioned in the First Federal Action and appears in the State Court Action only at the *conclusion of LLL&M submissions* in a September 25, 1991, Briggs reply affidavit, concomitant with LLL&M memorandum which strains to explain "the Firm's" obvious continuation, notwithstanding Briggs' sworn submission of "annualized" disappearances. (R. 1026-29, etc.).

Absent express expulsion power, a §63 dissolution must have been required so as to have altered AEC's continuing partnership status. Simply, Greene and Briggs contention for "policy" and their admitted deletion of AEC's name within any post-commencement-of-litigation, but dated "**as of** January 1, 1990", circulated Agreement or signature page(s), evidences nothing more than the unconstitutional, self-help-implemented preclusion of AEC's partnership status, rights and benefits by these LLL&M senior members.

LLL&M's *hypothetical* contention, notwithstanding absent all supporting evidence, for express "at will" dissolution(s) by all members of the "Firm", excepting AEC, i.e., by 132 partners purportedly with dissolution intent hypothetically "withdrawing" from the "firm" to which AEC has been a "partner" so as to form a "new firm", with identical name, partners, associates, accounts, etc., etc., i.e., with all identical, excepting AEC who has been represented as excluded, demonstrates the form-over-substance of LLL&M's "at will" submissions. If this LLL&M contention not be a substantive *de facto* represented expulsion, what is an "expulsion"? If this not be a Big Firm circumvention of *Millet v. Slocum*'s requirement for express expulsion provision "strictly applied" so as to avoid adverse publicity and the inconvenience of public, due process required, §63 dissolution proceedings. Of what purpose is "partnership"? If expulsion is to become *de facto* "at will", with predictable catastrophic consequence for "juniors", of what relevance are legislative pronouncements and judicial interpretations concerning expulsion clauses, §63 due process remedies, "damages" for wrongful breach and/or other perennial partnership issues? Why should this LLL&M contrivance, including its self-help accomplishment of the destruction of AEC's career and professional standing - more with AEC's particular medical concerns at 38-42 years of age - notwithstanding the admitted absence of express expulsion power and all evidence of

any actual "dissolution", indeed, *any* dissolution intent by any member of "the Firm", much less 132, be accepted upon Briggs and Greene's contention for an "alternative" to "move on" without Alison? Consistently, LLL&M attempts to ignore the internal inconsistency, implausibility, and irrationality, indeed, obvious after-the-fact invention of these submissions. Consistently, LLL&M attempts to ignore (i) "at will" application only for a partner's withdrawal - a non-occurrence; (ii) "at will" preclusion in their own agreement, except in contravention; and (iii) absence of evidence of substantive dissolution, i.e., "at will" presentation only as sham.

LLL&M sought summary judgment upon purported "at will" dissolution and *Trial By Affidavit* conclusory allegations; all factual basis supporting LLL&M's contentions, if any, remains within LLL&M's records and in the minds of LLL&M witnesses. ***Since these claims were first presented*** in the First Federal Action (March, 1990) and continuing through the date of this Petition, (i) there has *not been any finding* - in any opinion or judgment, declaratory or otherwise - *of any LLL&M dissolution, "at will" or otherwise*, (ii) there has not been any addressing of §§ 80-81 mandatory filing and publication requirements, nor LLL&M's evidenced failure in such compliance "since 1981 and earlier", and (iii) there has not been any discovery in this dispute in any forum upon any claim/cause of action - indeed, all discovery has been stayed immediately and completely upon LLL&M request - together with, at LLL&M request, application at the pleadings stage of summary judgment upon a patently sham "defense", more, a defense which denies all Fourteenth Amendment assurance.

D: LLL&M's BREACH OF §§'s 80-81; THERE IS ABSENT ALL EVIDENCE OF ANY STATUTORILY MANDATED DISSOLUTION CERTIFICATE FILING(S) AND PUBLICATION(S)

Upon pretextual justification, in breach of a national law partnership's Agreement, AEC has been made subject to extreme

obloquy as a result of LLL&M's submission of a sham defense.[21] AEC's right to carry on her lawful profession at LLL&M is a ***property right***; interference without just cause provides grounds for damages and/or injunction. LLL&M's sham defense was no defense; rather, a continuing threat, constituting irreparable injury. Only upon LLL&M self-help, not upon due process nor equal protection, has AEC's partnership interests been affected. Partnership Law §§80-81 authorizes the continued use of the *LLL&M name* only under prescribed conditions; an injunction should have issued to have restrained noncompliance by any "new" entity. AEC has continuing interests in *LLL&M*, including the "*LeBoeuf, Lamb, Leiby & MacRae*" name and in any continuing "business" using that name. AEC's ability so to continue in her partnership business, pursuant to §§ 63 and 80-81, is a property right which may not "at will" be extinguished, *her reputation and professional occupation* made subject to stigma and absent the "appropriate safeguards" of §§ 62(1)(d), 63 and 80-81.[22]

E: AEC WAS ENTITLED TO DECLARATORY RELIEF, A CONSTRUCTIVE TRUST AND AN ACCOUNTING

LLL&M's representation for satisfaction to AEC through payment over three (3) years of a $43,603.49 Memorandum Account balance as their sole obligation to a partner "leaving the firm for any reason" (R. 494), misstates the Agreement and overlooks application of actual dissolution principles.

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[21] *See Robert W. Stark Jr., Inc. v. New York Stock Exchange Inc.*, 346 F.Supp. 217, 232 (S.D.N.Y., 1972), *aff'd* 466 F.2d 743 (2nd Cir. 1972) ("Such a severe penalty has not before been visited..." absent express expulsion power contained in an agreement.) AEC's pecuniary damages for the loss of ability to practice her profession as a partner at a national law firm are far from conclusory or speculative. *See generally H.L. Hayden Co of N.Y. v. Siemens Medical Systems*, 879 F.2d 1005, 1024 (2nd Cir. 1989)

[22] *See Paul v. Davis*, 424 U.S. 693, 701-02, 47 L.Ed.2d 405, 96 S.Ct. 1155, 1160-61 (1976). LLL&M's "at will" conduct adversely has affected *not only* AEC's *reputation*, but also, simultaneously, her partnership interests, professional occupation and professional standing - indeed, unconscionably.

Notwithstanding absence of "dissolution" reality - *the issue* in the State Court Action, nonetheless, not addressed - AEC requests that relief be granted which does declare the status of the LLL&M partnership, Greene's and Briggs' represented dissolution(s) of *the "firm"*, indeed, "policy" for such "since 1981 and earlier", and continued business under same name notwithstanding absence of all §§80-81 compliance.

F: LLL&M'S MOTION FOR SUMMARY JUDGMENT UPON BREACH OF FIDUCIARY DUTY/UNJUST ENRICHMENT SHOULD HAVE BEEN DENIED.

LLL&M's contentions were insupportable; the precedents cited and adopted in the Lebedeff Ruling, inapposite: (i) the ***standard*** for breach of fiduciary duty in a partnership does not include the ***corporate*** "business judgment" rule; (ii) AEC has not "ratified" any "acts" - nor is this contention any defense; (iii) unduly, LLL&M has been enriched to AEC's detriment; and (iv) the "at will" defense remains a sham; its presentation more than a breach of fiduciary duty.

G: LLL&M'S SUMMARY JUDGMENT MOTION UPON FRAUD AND PROMISSORY ESTOPPEL SHOULD HAVE BEEN DENIED.

AEC's complaint set forth particularized facts; AEC's affidavit submissions remain unrebutted. In truth, LLL&M, not AEC, "elected" not to offer any evidence. AEC's fraud claims satisfied all elements to state a claim. Definitively, proof of the fraud claims was dependent upon the intent of LLL&M witnesses and the production of LLL&M and Defendant-Appellee, John C. Richardson (*"Richardson"*) documents. LLL&M practices concerning work assignment, advancement, evaluation, business/client association, medical and maternity representations/assurances could not be determined in the absence of findings of intent; contemporaneous records and deposition testimony were essential. AEC's reliance was reasonable, e.g., Richardson was cloaked with authority. Upon AEC's purported "advancement", her integration into LLL&M's Major Tax Practice Areas was reduced, then extinguished. Promised assignments of

client billable work and client development opportunities did not occur: *This*, the uncontested factual basis for these claims (R. 862-73), *not* as Lebedeff, J., erroneously characterized: "[i]f she produced quality work...". (App A at 6a). More, there is absent all evidence for Lebedeff, J.'s erroneous contention that AEC "was *not* the only partner to be excluded from the partnership when it was *reformed*". (*Id.* at 7a). This LLL&M contention is a sham - LLL&M has *not* dissolved, nor "reformed", *nor was any evidence submitted of "other" partners leaving* - indeed, as "policy", annually - excepting pursuant to *consensual* "withdrawal", i.e., pursuant to Agreement §8(c) express "*withdrawal(s)*", *not* "at will" "*dissolution(s)*".

H: LLL&M'S MOTION FOR SUMMARY JUDGMENT UPON INTERFERENCE WITH PROPERTY RIGHTS AND PROSPECTIVE ECONOMIC ADVANTAGE SHOULD HAVE BEEN DENIED

These claims were *not grounded upon breach of contract*, but upon tort - LLL&M's breach of fiduciary duty to AEC. LLL&M's refrain that they had an absolute right to terminate their relationship with AEC *for any or no reason...*" (R. 926), grounded upon a misapplied rationale, indeed, one repudiated in their own Agreement - as well contended in sham - is demonstrative of the wilfulness of LLL&M's behavior and their failure to implement traditional partnership fiduciary standards and §§ 62(1)(d) and 63 due process and equal protection assurances. As attorneys, LLL&M remains bound by Canons to multiple duties to AEC, particularly relating to her reputation for competence and integrity in her profession and concerning her professional standing in the legal community. The *unrebutted* presentation of LLL&M's discrimination, unfair dealing, wasteful practices and wilful preferential acts demonstrated the inappropriateness of LLL&M's "summary judgment" motions. The legal duties imposed by partnership and Canons precluded challenge to the legal sufficiency of this claim, one grounded not upon contract breach, but upon fiduciary duty breach. LLL&M's effort to recharacterize the claim into "intentional interference with contract" (R. 927), was delusory. AEC alleged violations of legal duties *independent* of contract; AEC alleged tortious interference with her ***property rights***

in her profession and business.

I: LLL&M'S MOTION FOR SUMMARY JUDGMENT UPON CONVERSION/REPLEVIN SHOULD HAVE BEEN DENIED

AEC's allegations stated a claim. The rationale supporting AEC's claim for interference with property rights, etc., i.e., a breach of fiduciary duty *independent of contract*, supported this claim.[23] Here, AEC alleged that LLL&M exercised unauthorized ownership rights over AEC's property interests in the LLL&M partnership, and/or their value, including AEC's share in all continuing partnership interests, the use of "LLL&M" partnership name and the value of accounts receivable. AEC has continuing property rights in LLL&M, a "partnership" *either* which has not been dissolved, or - notwithstanding absence of all supporting evidence - has been dissolved in contravention. In either circumstance, there has been - and remains - a wrongful breach of duty, i.e., a tort independent of contract.

J: LLL&M'S MOTION FOR SUMMARY JUDGMENT UPON INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS SHOULD HAVE BEEN DENIED

As there has not been a dissolution, other than in contravention, there has not been a "mere termination of a partnership interest". (App A at 8a). LLL&M's reliance upon "at-will" *employee* precedent is inapposite. Intentional destruction of AEC's career and intentional acts imposing medical and other distress and stigma by LLL&M under the facts and circumstances outlined have gone "beyond all possible bounds of decency...". For four (4) years, LLL&M has impeded summary judgment in AEC's favor upon a sham defense, indeed, contention for a "policy" which purports to replace LLL&M's own Agreement.

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[23]*See Robinson Redevelopment Co. v. Anderson*, 547 NYS 2d 458 (AD 3 Dept., 1989) (fiduciary duty owed arising from professional relationship).

K: DUE PROCESS REQUIRED DISCOVERY AND A PUBLIC HEARING

AEC's prompt request for CPLR §§3212(f) and 3214(b) relief (App T at 60a) and service of discovery demands were appropriate to stay LLL&M's summary judgment motion because absent all discovery: AEC was denied due process in the application of summary judgment at the pleadings stage upon all causes of action and upon the immediate and complete discovery stay(s).[24] AEC satisfied requirement for discovery upon causes of action for which summary judgment was precluded grounded upon the existence of triable issues of fact, particularly relating to the intent of LLL&M witnesses and their conduct, e.g., concerning purported dissolutions "'at will' since 1981, and earlier", fraud, and breaches of fiduciary duty; this discovery remained exclusively in LLL&M's control. Absent discovery, AEC was denied all due process and equal protection so as to demonstrate from LLL&M's documents and from the testimony of LLL&M and/or other witnesses, *inter alia*, that the "at will" contention was a sham. Further, these CPLR statutes - providing due process (and equal protection) safeguards - should have precluded all application of summary judgment at the pleadings stage upon any AEC cause of action.

AEC's allegations were comprehensive and complex, related to events at a national law partnership during a period in excess of eight (8) years, 1981-1990, were presented by an individual plaintiff and her sole counsel against a well-financed, institutional, national law partnership, which prior to any discovery cross-moved upon three (3) days notice for summary judgment against every claim. LLL&M's meager and conclusory affidavits did not satisfy minimum summary judgment standard - the absence of "genuine issue of fact" - nor does that appear to have been their purpose. LLL&M's self-help conduct - as condoned by the State judicial authorities - violated AEC's property and liberty interests in the

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[24]*See Roth*, 408 U.S., *supra*, at 573: [W]here a person's good name, reputation, honor, or integrity is at stake *because of what the government is doing to him*, notice and an opportunity to be heard are essential...". (Emphasis added). *See also Simpson v. Term Industries*, 510 NYS 2d 873 (AD 1 Dept., 1987) (Deposition notices and document requests outstanding at time of service of summary judgment motion causes §3212(f) to become operable).

LLL&M partnership through failure to require elemental due process and equal protection safeguards.

CONCLUSION

In consequence of the unfair denial to AEC of relief in the First Federal Action, prejudicially, AEC has been denied a fair State court forum. The circumvention of LLL&M's "at will" contrivance continues; nonetheless, judicial characterizations unfairly addressing LLL&M's purported "at will" defense have denied all constitutional outcome. The Due Process and Equal Protection guarantees assured to AEC under Partnership Law §§62(1)(d), 63 and 80-81 have been subverted, indeed, upon uniquely unfair State court "proceedings". For these reasons, the Petition for a Writ of Certiorari should be granted.

DATED
New York, New York
November 28, 1994

Respectfully submitted

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APPENDICES

APPENDIX A - OPINION
SUPREME COURT OF THE STATE OF NEW YORK,
COUNTY OF NEW YORK
DATED FEBRUARY 14, 1992

ALISON E. CLAPP,

Plaintiff,

- against-

LeBOEUF, LAMB, LEIBY & MacRAE; DONALD J. GREENE, DONALD J. GREENE, P.C., TAYLOR R. BRIGGS, TAYLOR R. BRIGGS, P.C., ALAN M. BERMAN, GEOFFREY D.C. BEST, DAVID P. BICKS, DAVID P. BICKS, P.C., CHARLES W. HAVENS, III, CHARLES W. HAVENS, III, P.C., DOUGLAS W. HAWES, DOUGLAS W. HAWES, P.C., CARL D. HOBELMAN, CARL D. HOBELMAN, CHARTERED, JAMES F. JOHNSON, IV, RONALD D. JONES, RONALD D. JONES, P.C., GRANT S. LEWIS, GRANT S. LEWIS, P.C., CAMERON F. MacRAE, III, CAMERON F. MacRAE, III, P.C., SAMUEL M. SUGDEN, SAMUEL M. SUGDEN, P.C., COLLECTIVELY, A/K/A "THE LeBOEUF, LAMB, LEIBY & MacRAE ADMINISTRATIVE COMMITTEE; RICHARD M. BERMAN, RICHARD C. COLE, ROBERT A.N. CUDD, CECILIA KEMPLER, PETER R. O'FLINN, FREDERICK B. LACEY, COLLECTIVELY, A/K/A "THE LeBOEUF, LAMB, LEIBY & MacRAE COUNCIL"; IRVING MOSKOVITZ, PETER N. SCHILLER, JOHN A. YOUNG, COLLECTIVELY A/K/A "THE MOSKOVITZ GROUP"; JOHN W. WEBER; MOLLY S. BOAST; PAUL R. STUKEN; JOHN C. RICHARDSON and JOHN C. RICHARDSON, P.C.,

Defendants.

Index No. 15586/91
OPINION

DIANE A. LEBEDEFF, J.:

By three motions, combined here for disposition, both parties seek summary judgment. In the event judgment is not

granted, defendants request consolidation, to which plaintiff does not object, and plaintiff seeks priority in depositions.

A request by defendant for a stay pending resolution of a federal action is now moot. The federal court found a lack of subject matter jurisdiction, which determination was affirmed by the Second Circuit Appeals Court. The United States Supreme Court recently denied certiorari.

Plaintiff, an attorney specializing in taxation, was an associate of defendant law firm from 1982 to 1985 and a partner from January, 1986, to December, 1989, when the partnership severed its relationship with her. In this court, plaintiff has instituted this action based upon a claim of wrongful termination of plaintiff's partnership and partnership rights, while a separate tort complaint raises other related issues. By agreement of the parties, the allegations of both complaints will be considered herein.

The First Complaint

The thrust of plaintiff's first complaint, under Index No. 15586/91, is that the defendants could not lawfully dissolve the partnership which included plaintiff (the "partnership") in order to expel plaintiff without cause. The complaint contains seven causes of action: (1) specific performance of the partnership agreement; (2) a declaratory judgment regarding her partnership rights; (3) and (4) breach of fiduciary duty in connection with such firm matters as the opening of branch offices, billing practices, compensation of other partners and work assignments; (5) an accounting for partnership profits; (6) constructive trust; and, (7) injunctive relief prohibiting the termination of the partnership.

It is most significant here that the partnership had an indefinite term. The applicable principles of law are well settled. A partnership for an indefinite term is a partnership at will terminable at any time by the act of any partner (*De Martino v. Pensavalle*, 56 A.D.2d 589 [2nd Dept. 1977]; *Shandell v. Katz*, 95 A.D.2d 742 [1st Dept. 1983]). As recognized in *Karrick v. Hannaman*, 168 U.S. 328 (1897), a partnership must be based on mutual trust and confidence with each individual remaining a partner only with the consent of the others, so that if the term of a partnership is foreshortened, an aggrieved partner has a remedy

in damages but cannot compel the continuation of the partnership.

Plaintiff is unable to point to any clause in the partnership agreement that would render these concepts inapplicable. Indeed, in the partnership agreement, Section 1(a) provides as follows:

> "The term of the partnership represented by the firm shall be indefinite, and the firm shall continue until the completion of any winding up of the partnership affairs of the firm. It is the intent of this Agreement that, notwithstanding (i) the death or retirement of a partner, or the withdrawal of partners from or admission of partners to the firm, or any alteration in the shares in the net profits and contributions to the net losses of the firm among the partners, or (ii) any other act or condition, not in contravention of the terms of this Agreement, that by operation of law might constitute a dissolution of the partnership represented by the firm, the firm shall continue as a law partnership, whether pursuant to appropriate amendments of this Agreement or by other consensual arrangements. For the purpose of effectuating the foregoing and to the full extent that the following waiver and agreement are enforceable under applicable law and codes of professional responsibility, each of the partners hereby waives for himself, the heirs and estate of an individual partner and assignees of a professional corporate partner, and agrees not to exercise any claim, any right in connection with his or any other partners [**sic**] death, retirement or withdrawal, or any other act or condition that, by operation of law, might constitute dissolution to (x) wind up the partnership affairs of the firm, (y) have the partnership property applied to discharge the firm's liabilities, with the surplus applied to pay net amounts owing to the respective partners, or (z) secure a formal accounting of his interest in the firm."

Because the partnership explicitly had an indefinite term, such dissolution is permitted under Section 62 of the Partnership Law, which provides dissolution may occur:

> "1. Without violation of the agreement between the

partners,

* * *

(b) by the express will of any partner when no definite term or particular undertaking is specified."

Further, subdivision (d) of Section 62 explicitly permits expulsion if in accord with the partnership agreement.

Based upon these principles, plaintiff's various claims to enforce the partnership agreement must fall (see, Complaint, paras. 19, 24, 29, 54, 66 and 70, among others). Specifically, the first, second and seventh causes of action must fall, as well as some of the allegations included in the fourth cause of action.

The language from the partnership agreement quoted above also waives a right to an accounting and such waivers have been enforced (see *Raymond v. Brimberg*, 99 A.D.2d 988 [1st Dept. 1984]), which defeats the fifth cause of action for an accounting. In any event, no dispute requiring an accounting is demonstrated in the face of defendant's admission. Defendants acknowledge plaintiff must be paid her proportionate share of the firm's "memorandum account," representing fees which were earned but not yet collected from clients. It is undisputed that plaintiff had made no capital contributions to the firm. Although defendants offered plaintiff approximately $37,000, she refused to accept it without providing any reason to dispute defendants' figures (see *Curtin v. Glazier*, 94 A.D.2d 434 [4th Dept. 1983]).

The third and fourth causes of action appear to allege mismanagement of the firm. The complaint casts these causes of action as ones in unjust enrichment, a quasi-contract theory which might concievably [sic] be used to support a constructive trust argument (see, *Dalton v. Union Bank of Switzerland*, 134 A.D.2d 174, 177 [1st Dept. 1987]), which is independently rejected here for reasons given below. The complaint also claims breach of fiduciary duty, which ennunciates [sic] only a standard of care (see, as to definition, *Chipman v. Steinberg*, 106 A.D.2d 343 [1st Dept.], aff'd 65 N.Y.2d 843 [1985]). which would be similar here to the fiduciary duty owed by the directors of a corporation (*Lichtyger v. Franchard Corp.*, 18 N.Y.2d 528 [1966]).

It appears that the business judgment rule articulated in *Auerbach v. Bennett*, 47 N.Y.2d 619 (1979), would be applicable to actions taken by the managing partners of a partnership.

Plaintiff does not show that the actions in question were concealed from her, that the members of the committee profited at her expense, or that she objected to any of the actions prior to defendants' termination of the partnership. The third clause of action claims the Administrative Committee acted to the detriment of the firm (Complaint, para. 26), and must fall because it is not pleaded derivatively.

The fourth cause of action has the same premise but addresses plaintiff's treatment by the firm, including lack of assignment to billable hours (Complaint, para. 44) and the termination of her partnership (*Id.*, paras. 48 and 49). It generally recites partnership decisions and priorities (*Id*, paras. 50 through 53). It concludes with an allegation that the firm has resources to "satisfy Plaintiff's continuing partnership interests" and that the firm is "wrongfully precluding Plaintiff's provision of legal services" (*Id.*, para. 55). This claim would have the court second guess partnership management in contravention of the policy set forth in *Auerbach v. Bennett*, *supra*, and must fall on that basis, and, to the extent it does not, it is an unsupportable [sic] attempt to assert a continuing partnership interest.

To the extent, if any, that plaintiff deems herself to be a de facto employee, rather than a partner, of the firm, that argument is unavailing. An employment relationship is terminable at will since there is no viable cause of action in New York for wrongful or abusive discharge, absent ingredients not alleged here (*Murphy v. American Home Products Corp*, 58 N.Y.2d 293 [1983]).

As to the sixth cause of action seeking the imposition of a constructive trust, plaintiff bears the burden of establishing, as a necessary ingredient, that she transferred property to the defendants in reliance upon a confidential or fiduciary relationship (see *Sharp v. Kosmalski*, 40 N.Y.2d 119 [1976]). Because plaintiff did not contribute capital to the firm and makes no alternate showing or argument, plaintiff does not demonstrate entitlement to claim a constructive trust.

Because the other causes of action fall, the claim for punative [sic] damages may not survive. Based upon the foregoing, defendants' motion for summary judgment is granted as to the first complaint.

The Second Complaint

The second complaint also contains seven causes of action: (1) breach of contract; (2) and (3) fraud; (4) promissory estoppel; (5) intentional interference with plaintiff's property rights and prospective economic advantage; (6) conversion or replevin; and (7) intentional infliction of emotional distress.

Each of these claims must be considered independently; although the first cause of action for damages for breach of the partnership agreement must be dismissed for the reasons stated above. As to the balance of the claims, which sound in tort, it may be observed that tort claims must arise out of a violation of a legal duty independent of the contract itself (*Clark-Fitzpatrick Inc. v. Long Island Railroad Co.*, 70 N.Y.2d 382 [1987]), which applies to fraud claims (*Metropolitan Transportation Authority v. Triumph Adv.*, 116 A.D.2d 526 [1st Dept. 1986]), and to claims of conversion (*Peters, Griffin, Woodward, Inc. v. WCSC, Inc.*, 88 A.D.2d 883 [1st Dept. 1982]).

The fraud claims assert two separate theories. The second cause of action alleges that defendants falsely represented to plaintiff that if she produced quality work, her continued partnership in the firm would be assured. The third cause of action effectively contends that plaintiff relied on defendants' promise of a partnership to her detriment in that such promises caused her to defer for several years any attempt to have children.

In order to make out a *prima facie* case for fraud, plaintiff must establish that: (1) defendants made a representation as to a material fact; (2) such representation was false; (3) defendants intended to deceive plaintiff; (4) plaintiff believed and justifiably relied upon the statement and was induced by it to engage in a certain course of conduct; and (5) as a result of such reliance plaintiff sustained pecuniary loss (*Channel Master Corporation v. Aluminum Limited Sales, Inc.*, 4 N.Y.2d 403 [1958]; *CPC International Inc. v. McKesson Corporation*, 70 N.Y.2d 268, 285 [1987]; *Ruse v. Inta-Boro Two-Way Radio Taxi Assocs, Inc.*, 166 A.D.2d 641 [2nd Dept. 1990]).

Although plaintiff has adduced sufficient evidence to raise a question of fact as to some of these elements, no viable argument is presented as to the element of scienter. In relation to statements

made by defendants as to plaintiff's chances of becoming a partner, plaintiff was actually made a partner, was a partner for three years, and she was not the only partner to be excluded from the partnership when it was reformed. In the face of the defendants' motion, plaintiff gives no indication that the statements were made with the intent to deceive plaintiff. "Absent a present intent to deceive, a statement of future intentions, promises or expectations is not actionable as fraud" (*Lane v. McCallion*, 166 A.D.2d 688, 690 [2nd Dept. 1990], citations omitted). .A mere statement of future intention to give plaintiff a long-term partnership would not be actionable absent proof that at the time defendants made the alleged promises, they never intended to perform them (see *Lanzi v. Brooks*, 54 A.D.2d 1057 [3rd Dept.], aff'd 43 N.Y.2d 778 [1977]).

Further, it is questionable whether plaintiff presents a proper claim for fraud damages by alleging current difficulty in conceiving a child. As stated in *Alpert v. Shea Gould Climenko & Casey*, 160 A.D.2d 67, 71 (1st Dept. 1990), "recovery of consequential damages naturally flowing from a fraud is limited to that which is necessary to restore a party to the position occupied before commission of the fraud" (citing *Reno v. Bull*, 226 N.Y. 546 [1919]), also called "out of pocket damages," which are not pleaded. Further, as fraud does not support, plaintiff seeks recovery under an agreement overlooked in favor of the actual agreement (*Id.* at 72). Accordingly, this cause of action must fall in the face of the motion.

The fourth cause of action is also premised on plaintiff's postponement of efforts to have children as a result of defendants' promises of a partnership but sounds in promissory estoppel. Promissory estoppel "is an estoppel which may arise when one agrees to do or not do something in the future" (57 N.Y.Jur.2d, Estoppel, Ratification & Waiver §2 at 8). An example is a promise of future employment causing a plaintiff to leave an existing job (see *Dalton v. Union Bank of Switzerland*, 134 A.D.2d 174, 176-177 [1st Dept. 1987]), and the cause of action must rest upon conduct which is egregious or unconscionable (*Bernard v. Langan Porsche Audi, Inc.*, 143 A.D.2d 495, 496 [3rd Dept. 1988]). Further, an estoppel has been defined as:

> "[Estoppel] is imposed by law in the interest of fairness to prevent the enforcement of rights which would work fraud or injustice upon the person against whom enforcement is sought and who, in justifiable reliance upon the opposing party's words or conduct, has been mislead into acting upon that belief that such enforcement would not be sought." (*Nassau Trust Co. v. Montrose Concrete Products Corp.*, 56 N.Y.2d 175, 184 [1982]; citations omitted).

Plaintiff fails to demonstrate that the promise of a partnership had any nexus to childbearing or why an estoppel concept may be brought into play. Accordingly, promissory estoppel does not lie upon the facts as pleaded and this cause of action must also be dismissed.

The fifth cause of action, alleging defendants' interference with plaintiff's property rights and economic advantage, must also be stricken. A party to a contract cannot be held liable for tortious interference with respect to that contract (*Key Bank of Northern New York, N.A. v. Lake Placid Co.*, 103 A.D.2d 19 [3rd Dept. 1984]). Thus, since defendants were parties to the partnership agreement, this cause of action cannot be sustained.

The sixth cause of action seeks replevin of her partnership interest. This claim must be dismissed for defendants have not converted any property which is subject to replevin.

The seventh cause of action alleges intentional infliction of mental distress arising out of defendants' termination of the partnership. In *Murphy v. American Home Products Corp.*, *supra*, the court found that the mere discharge of an employee did not give rise to an action for intentional infliction of emotional distress. The same principle holds true for the mere termination of a partnership interest, especially when, as plaintiff alleges, it was in lieu of discharge.

* * *

Accordingly, the defendants' motion for summary judgment is granted and both complaints are dismissed. Plaintiff's applications are denied in their entirety.

Settle judgment.

Dated: February 14, 1992

/Diane A. Lebedeff
J.S.C.

APPENDIX B - ORDER ENTERED IN THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST JUDICIAL DEPARTMENT, IN THE COUNTY OF NEW YORK, AFFIRMING ORDER AND JUDGMENT OF THE SUPREME COURT, ENTERED MARCH 18, 1992, DATED DECEMBER 15, 1992

APPELLATE DIVISION OF THE
SUPREME COURT OF THE STATE OF NEW YORK
FIRST JUDICIAL DEPARTMENT
COUNTY OF NEW YORK

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, entered on Dec. 15, 1992

Present -- Hon.	Joseph P. Sullivan	Justice Presiding
	Richard W. Wallach	
	Theodore R. Kupferman	
	David Ross,	Justices

ALISON E. CLAPP,
Plaintiff,

-against-

LeBOEUF, LAMB, LEIBY & MacRAE, et al.,

Defendants.

46946

An appeal having been taken to this Court by the above-named appellant, from an order and judgment (one paper) of the Supreme Court, New York County (Diane A. Lebedeff, J.), entered on March 18, 1992,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon,

It is unanimously ordered that the order and judgment (one paper) so appealed from be and the same is hereby affirmed for the reasons stated by Lebedeff, J., without costs and without disbursements.

ENTER:

/Signature

Clerk

APPENDIX C - ORDER ENTERED IN THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST JUDICIAL DEPARTMENT, IN THE COUNTY OF NEW YORK, DENYING LEAVE TO APPEAL TO THE COURT OF APPEALS FROM DECISION AND ORDER OF APPELLATE DIVISION ENTERED DECEMBER 15, 1992, DATED APRIL 8, 1993

APPELLATE DIVISION OF THE
SUPREME COURT OF THE STATE OF NEW YORK
FIRST JUDICIAL DEPARTMENT
COUNTY OF NEW YORK

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, entered on April 8, 1993

Present -- Hon. Joseph P. Sullivan, Justice Presiding
Richard W. Wallach
Theodore R. Kupferman
David Ross, Justices

ALISON E. CLAPP,
Plaintiff,

-against-

LeBOEUF, LAMB, LEIBY & MacRAE, et al.,

Defendants.

M-957

Plaintiff having moved for leave to appeal to the Court of Appeals from the decision and order of this Court entered on December 15, 1992 (Appeal No. 46946),

Now, upon reading and filing the papers with respect to said motion, and due deliberation having been had thereon,

It is ordered that said motion be and the same is denied.

ENTER:

/Signature

Clerk

APPENDIX D - ORDER ENTERED IN THE COURT OF APPEALS OF THE STATE OF NEW YORK, DISMISSING APPEAL, DATED MAY 6, 1993

STATE OF NEW YORK, COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the sixth day of May, 1993

Present, Hon. Judith S. Kaye, ***Chief Judge, presiding***

ALISON E. CLAPP,
Appellant,

-against-

LeBOEUF, LAMB, LEIBY & MacRAE, et al.,

Respondents.

Mo. No. 493 SSD 23

The appellant having filed notice of appeal in the above title and due consideration having been thereupon had, it is

ORDERED, that the appeal be and the same hereby is dismissed without costs, by the Court *sua sponte*, upon the ground that no substantial constitutional question is directly involved.

/Signature
Donald M. Sheraw
Clerk of the Court

APPENDIX E - ORDER ENTERED IN THE COURT OF APPEALS OF THE STATE OF NEW YORK, DENYING MOTION FOR LEAVE TO APPEAL, DATED JUNE 21, 1994

STATE OF NEW YORK, COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twenty-first day of June, 1994

Present, Hon. Judith S. Kaye, *Chief Judge, presiding*.

ALISON E. CLAPP,
Appellant,

-against-

LeBOEUF, LAMB, LEIBY & MacRAE, et al.,

Respondents.

1-10 Mo. No. 454

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied with one hundred dollars costs and necessary reproduction disbursements.

/Signature _____
Donald M Sheraw
Clerk of the Court

APPENDIX F - ORDER ENTERED IN THE COURT OF APPEALS OF THE STATE OF NEW YORK, DENYING MOTION FOR REARGUMENT OF MOTION FOR LEAVE TO APPEAL, DATED SEPTEMBER 1, 1994

STATE OF NEW YORK, COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the first day of September, 1994

Present, Hon. Judith S. Kaye, *Chief Judge, presiding*.

ALISON E. CLAPP,
Appellant,

-against-

LeBOEUF, LAMB, LEIBY & MacRAE, et al.,
Respondents.

Mo. No. 1008

A motion for reargument of motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied with one hundred dollars costs and necessary reproduction disbursements.

/Signature
Donald M. Sheraw
Clerk of the Court

APPENDIX G - ORDER AND JUDGMENT OF SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK, DATED MARCH 18, 1992

At an IAS Part 8 of the Supreme Court of the State of New York, held in and for the County of New York, at the Courthouse, located at 60 Centre Street, New York, New York on the 18th day of March, 1992.

P R E S E N T:

HON. DIANE A. LEBEDEFF,

Justice.

ALISON E. CLAPP,
Plaintiff,

- against-

LeBOEUF, LAMB, LEIBY & MacRAE; DONALD J. GREENE, DONALD J. GREENE, P.C., TAYLOR R. BRIGGS, TAYLOR R. BRIGGS, P.C., ALAN M. BERMAN, GEOFFREY D.C. BEST, DAVID P. BICKS, DAVID P. BICKS, P.C., CHARLES W. HAVENS, III, CHARLES W. HAVENS, III, P.C., DOUGLAS W. HAWES, DOUGLAS W. HAWES, P.C., CARL D. HOBELMAN, CARL D. HOBELMAN, CHARTERED, JAMES F. JOHNSON, IV, RONALD D. JONES, RONALD D. JONES, P.C., GRANT S. LEWIS, GRANT S. LEWIS, P.C., CAMERON F. MacRAE, III, CAMERON F. MacRAE, III, P.C., SAMUEL M. SUGDEN, SAMUEL M. SUGDEN, P.C., COLLECTIVELY, A/K/A "THE LeBOEUF, LAMB, LEIBY & MacRAE ADMINISTRATIVE COMMITTEE; RICHARD M. BERMAN, RICHARD C. COLE, ROBERT A.N. CUDD, CECILIA KEMPLER, PETER R. O'FLINN, FREDERICK B. LACEY, COLLECTIVELY, A/K/A "THE LeBOEUF, LAMB, LEIBY & MacRAE COUNCIL"; IRVING MOSKOVITZ, PETER N. SCHILLER, JOHN A. YOUNG, COLLECTIVELY

A/K/A "THE MOSKOVITZ GROUP"; JOHN W. WEBER; MOLLY S. BOAST; PAUL R. STUKEN; JOHN C. RICHARDSON and JOHN C. RICHARDSON, P.C.,

Defendants.

Index No. 15586/91

ORDER AND JUDGMENT

This action having been commenced by the service of a Summons and Verified Complaint on or about July 3, 1991, and defendants having served a Verified Answer to the Complaint on or about July 22, 1991 and a Verified Amended Answer to the Complaint on or about August 12, 1991, and

Plaintiff having moved by Notice of Motion, dated July 2, 1991, for an order, pursuant to CPLR 3106, granting deposition priority to plaintiff and for related relief, and

Plaintiff, having moved by Notice of Motion, dated August 7, 1991, for an order pursuant to CPLR 3212 granting summary judgment in her favor, and

Defendants having cross-moved by Notice of Cross-Motion, dated August 19, 1991, for an order, pursuant to CPLR 3211(a) (4) and 2201, dismissing or staying this action on the ground that a prior action by plaintiff against the defendants, entitled *Alison E. Clapp v. Donald J. Greene, et al.*, was then pending in the United States District Court for the Southern District of New York; or, in the alternative, for an order, pursuant to CPLR 3212, granting summary judgment dismissing plaintiff's complaint, and

Plaintiff having commenced a second action against defendants by the service of a Summons and a Second Verified Complaint on or about August 23, 1991, and defendants having served a Verified Answer to plaintiff's Second Verified Complaint on or about September 11, 1991, and

Defendants having moved by Notice of Motion, dated September 11, 1991, for an order, pursuant to CPLR 602(a), consolidating plaintiff's second action with the prior action (bearing Index No. 15586/91) commenced in July 1991, dismissing plaintiff's second action pursuant to CPLR 3211(a) (4) and 2201 based on the pendency of the aforementioned federal court action, or, in the alternative, granting summary judgment dismissing plaintiff's second complaint pursuant to CPLR 3212, and said

motions having regularly come on to be heard on October 3, 1991 and having been consolidated for disposition, and the Court, after due deliberation, having rendered a written decision on February 14, 1992,

NOW, upon reading and filing plaintiff's Notice of Motion dated July 2, 1991, the Affirmation of Daniel J. O'Callaghan, dated July 2, 1991, together with the exhibits annexed thereto, in support of plaintiff's motion for deposition priority and related relief; the Affirmation of Christopher J. Sullivan, dated August 1, 1991, together with the exhibits annexed thereto, in opposition to plaintiff's motion for deposition priority; the Reply Affirmation of Daniel J. O'Callaghan, dated August 5, 1991, together with the exhibits annexed thereto, in further support of plaintiff's motion for deposition priority; plaintiff's Notice of Motion dated August 7, 1991, the Affirmation of Daniel J. O'Callaghan, dated July 31, 1991, and the Affidavit of Alison E. Clapp, sworn to July 31, 1991, together with the exhibits annexed thereto, in support of plaintiff's motion for summary judgment granting the relief demanded in plaintiff's first complaint, dated June 26, 1991; defendants' Notice of Cross-Motion, dated August 19, 1991, the Affirmation of Christopher J. Sullivan, dated August 19, 1991, and the Affidavit of Donald J. Greene, sworn to August 15, 1991, together with the exhibits annexed thereto, in opposition to plaintiff's motion for summary judgment and in support of defendants' cross-motion to dismiss or stay plaintiff's first action or, in the alternative, for summary judgment in defendants' favor dismissing plaintiff's first complaint dated June 26, 1991; the Affidavit in Reply of Alison E. Clapp, sworn to September 12, 1991, together with the exhibits annexed thereto, in further support of plaintiff's motion for summary judgment and in opposition to defendants' cross-motion to dismiss or stay plaintiff's first action or for summary judgment dismissing plaintiff's first complaint; defendants' Notice of Motion, dated September 11, 1991, the Affirmation of Christopher J. Sullivan, dated September 11, 1991, the Affidavit of Donald J. Greene, sworn to August 15, 1991, together with the exhibits annexed thereto, in support of defendants' motion to consolidate plaintiff's second action with her first action, to dismiss or stay plaintiff's second action or, in the alternative, for summary judgment dismissing plaintiff's second complaint; dated August 23, 1991, the Affidavit of Alison E.

Clapp, sworn to September 17, 1991, together with the exhibits annexed thereto, in opposition to defendants' motion to dismiss or stay plaintiff's second action or for summary judgment dismissing the second complaint; and the Reply Affidavit of Taylor R. Briggs, sworn to September 25, 1991, in further support of defendants' cross-motion and motion to dismiss or stay both of plaintiff's actions based on the pendency of her prior federal court action or for summary judgment dismissing plaintiff's two complaints,[1] and upon the written decision, dated February 14, 1992, heretofore rendered by the Court, it is hereby

ORDERED, that plaintiff's motion for priority in depositions is denied, and it is further

ORDERED, that plaintiff's motion for summary judgment is denied, and it is further

ORDERED, that defendants' motion and cross-motion are denied as moot to the extent that they sought a stay pending resolution of plaintiff's federal court action against defendants, and it is further

ORDERED, that defendants' motion to consolidate plaintiff's two actions is granted without opposition, and it is further

ORDERED, that the two actions commenced by plaintiff against defendants by the service of Verified Complaints, dated June 26, 1991 and August 23, 1991, respectively, having identical captions, are consolidated without prejudice to plaintiff's right, if any, to a trial by jury of the causes of action alleged in plaintiff's second complaint, dated August 23, 1991, under the caption and index number (Index No. 15586/91) set forth above, and it is further

ORDERED, that the pleadings in the two actions hereby consolidated shall stand as the pleadings in the consolidated action, and it is further

ORDERED, that the remaining branches of defendants' cross--motion and motion, seeking an award of summary judgment in defendants' favor, are granted, and it is further

ORDERED AND ADJUDGED, that the verified complaints, dated June 26, 1991 and August 23, 1991, in the actions

---

[1]AND THE AFFIDAVIT OF ALLISON [sic] CLAPP SWORN TO OCTOBER 2, 1991, WITH EXHIBITS

consolidated herein are dismissed on the merits with prejudice and that defendants shall recover of plaintiff, Alison E, Clapp, 43 West 61st Street, New York, New York, costs and disbursements in the sum of $200.00 as taxed and shall have execution therefor.

ENTER

S/Diane A. Lebedeff
J.S.C.

S/Signature
Clerk

APPENDIX H - AEC'S TRIAL COURT RAISING OF FEDERAL QUESTIONS

A. AEC Affidavit, sworn to September 12, 1991, in Support of AEC's Motion For Preliminary Injunction and Partial Summary Judgment and In Opposition to LLL&M's Cross-Motion, p. 8 [R. 723]:

"Should...[LLL&M] have *evidence* supporting Greene's contentions, Partnership Law §63 sets forth numerous due process remedies which were available to LLL&M. However, self-help was not authorized. Predictably, such LLL&M self-help has accomplished grievous harm to my professional reputation, livelihood, sole source of income and financial ability to continue medical efforts to bear a child....

B. AEC Memorandum In Support of Summary Judgment, dated September 12, 1991, pp. 13-14:

In rational and obvious contradiction to LLL&M's contention for replacement of fiduciary duty with chaos, the Partnership Law *states* that expulsion be express, that it **strictly** be construed. Thereafter, in the absence of express expulsion power (or correlative to its implementation), **real "alternatives", §63 remedies**, are provided to assure civilized due process procedures for disgruntled partners - a sane mechanism for resolution of conflicting interests.... Absent express expulsion power, LLL&M's remedy should not have been self-help, but §63 remedies....

C. AEC Response to LLL&M's Consolidated Reply Memorandum, dated October 2, 1991, p.6:

Analogous to a spouse locked-out of the marital home, AEC has not become a "former" partner (or spouse), but only upon LLL&M's wilful self-help has her partnership interests been affected, rather than as could have been made legitimate if made subject to §63 **due-process** remedies....

APPENDIX I - ORDER ENTERED IN THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST JUDICIAL DEPARTMENT, IN THE COUNTY OF NEW YORK, ADJOURNING ARGUMENT OF THE APPEAL TO THE SEPTEMBER TERM OF THE COURT DATED APRIL 14, 1992

APPELLATE DIVISION OF THE
SUPREME COURT OF THE STATE OF NEW YORK
FIRST JUDICIAL DEPARTMENT
COUNTY OF NEW YORK

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, entered on April 14, 1992

Present -- Hon.	John Carro	Justice Presiding
	Ernst H. Rosenberger	
	Theodore R. Kupferman	
	Bentley Kassal	
	George Bundy Smith	Justices

ALISON E. CLAPP,

Plaintiff,

-against-

LeBOEUF, LAMB, LEIBY & MacRAE, et al.,

Defendants.

M-1686
M-1742

Defendants-respondents having moved this Court for an order adjourning argument of plaintiff's appeal from an order and judgment (one paper) of the Supreme Court, New York County,

entered on March 18, 1992,

And plaintiff-appellant having cross-moved for a preference in hearing argument of the appeal in the June 1992 term,

Now, upon reading and filing the papers with respect to the motion, and due deliberation having been had thereon,

It is ordered that the motion be and hereby is granted insofar as to adjourn argument of the appeal to the September 1992 term of this Court, to be so calendared by the Clerk, and with no further adjournments to be permitted; and

It is further ordered that the cross-motion be and hereby is denied.

ENTER:

/Signature

Clerk

APPENDIX J - ORDER ENTERED IN THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST JUDICIAL DEPARTMENT, IN THE COUNTY OF NEW YORK, DENYING REARGUMENT OF, OR IN THE ALTERNATIVE, LEAVE TO APPEAL FROM, THE ORDER OF THE APPELLATE DIVISION DENYING PREFERENCE IN HEARING IN THE JUNE 1992 TERM DATED JUNE 2, 1992

APPELLATE DIVISION OF THE
SUPREME COURT OF THE STATE OF NEW YORK
FIRST JUDICIAL DEPARTMENT
COUNTY OF NEW YORK

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, entered on June 2, 1992

Present -- Hon. John Carro — Justice Presiding
Ernst H. Rosenberger
Theodore R. Kupferman
Bentley Kassal
George Bundy Smith — Justices

ALISON E. CLAPP,
Plaintiff,

-against-

LeBOEUF, LAMB, LEIBY & MacRAE, et al.,

Defendants.

M-2541

Plaintiff-appellant having moved for reargument of, or in the alternative for leave to appeal to the Court of Appeals from,

the order (M-1686/M-1742) of this Court entered on April 14, 1992, which, *inter alia*, denied plaintiff's cross-motion for a preference in hearing, in the June 1992 term, argument of her appeal from an order and judgment (one paper) of the Supreme Court, New York County, entered on March 18, 1992,

Now, upon reading and filing the papers with respect to the motion, and due deliberation having been had thereon,

It is ordered that the motion be and hereby is denied, in its entirety, with $100 costs.

ENTER:

/Signature

Clerk

APPENDIX K - NOTICE OF MOTION FOR MODIFICATION AND/OR RELIEF FROM ORDER AND/OR LEAVE TO APPEAL TO THE COURT OF APPEALS, FILED IN THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT, DATED OCTOBER 14, 1992

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

ALISON E. CLAPP,
Plaintiff-Appellant,

- against-

LeBOEUF, LAMB, LEIBY & MacRAE, et al.,
Defendants-Respondents.

N.Y. County Clerk's
Index No. 15586/91

NOTICE OF MOTION FOR
MODIFICATION AND/OR RELIEF FROM ORDER AND/OR
LEAVE TO APPEAL TO THE COURT OF APPEALS

PLEASE TAKE NOTICE that, upon the annexed affirmation of Daniel J. O'Callaghan, dated October 14, 1992, and the exhibits annexed thereto, the Plaintiff-Appellant will move this Court at a term thereof to be held at the Courthouse, 27 Madison Avenue, New York, New York, on October 27, 1992 at 10 a.m., or as soon thereafter as counsel may be heard for Modification and/or Relief From the Court's June 2, 1992 Order, and/or For Leave to Appeal To the Court of Appeals, and/or granting such other and further relief as the Court may deem just and proper.

"Ex V"

Dated: New York, New York
October 14, 1992

DANIEL J. O'CALLAGHAN
Attorney for
Plaintiff-Appellant
17 Battery Place
New York, New York 10004
(212) 222-4200

TO: HERRICK, FEINSTEIN
Attorneys for Defendants-
Respondents
2 Park Avenue
New York, New York 10016
(212) 684-1400

APPENDIX L - AFFIRMATION IN SUPPORT OF MOTION FOR MODIFICATION AND/OR RELIEF FROM ORDER AND/OR LEAVE TO APPEAL TO THE COURT OF APPEALS, FILED IN THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT, DATED OCTOBER 14, 1992

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

ALISON E. CLAPP,
Plaintiff-Appellant,

- against-

LeBOEUF, LAMB, LEIBY & MacRAE, et al.,
Defendants-Respondents.

N.Y. County Clerk's
Index No. 15586/91

AFFIRMATION IN SUPPORT OF MOTION FOR MODIFICATION AND/OR RELIEF FROM ORDER AND/OR LEAVE TO APPEAL TO THE COURT OF APPEALS

DANIEL J. O'CALLAGHAN, an attorney admitted to practice before the Courts of the State of New York, affirms the following to be true under penalty of perjury:

1. I am the attorney for Plaintiff-Appellant, Alison E. Clapp ("**AEC**") in the above-captioned action and I am fully familiar with the facts stated herein.

2. I submit this affirmation in support of AEC's motion for Modification and/or Relief From the Court's June 2, 1992 Order and/or Leave to Appeal to the Court of Appeals. (Copy of Court's June 2, 1992, order annexed as **Ex. S**).

3. Oral argument was held before the Court on October 2, 1992. At argument, Defendants-Respondents, LeBoeuf, Lamb, Leiby, & MacRae, et al. ("**LLL&M**"), by counsel, it is submitted, continued in misrepresentation/misconduct through contention for the application of LLL&M's purported "at will" dissolution defense, an illegal, anarchical contrivance which has been presented since commencement of the action, initially in the Federal Action in/about February, 1990. In direct consequence, AEC has been compelled and continues to be compelled into **in extremis** circumstance, a condition daily which worsens.

4. Repeatedly, both at Special Term and before this Court, AEC's reliance upon rights to **Due Process** and **Equal Protection** guaranteed under both the Constitution of the United States and the Constitution of the State of New York have been asserted in support of AEC's claims and in opposition to the "at will" defense (e.g., before this Court at AEC Bf. Appl., 13-15, 24, 45, 47). Repeatedly, there has been addressed before this Court, indeed, at oral argument, the unprecedented denigration of a partner at a national law firm's, AEC's, reputation in consequence of the injustice continuing in this case.

5. In direct consequence of the continuing absence of restraint upon LLL&M's patent sham defense, a published report identifies AEC as a terminated partner, continuing the substantial damage to her reputation. (Copy of **New York Law Journal** front page report relating to the October 2, 1992 oral argument of this appeal, Vol. 208, No. 67, dated October 5, 1992, annexed as **Ex. T**).

6. This Court's oral argument stated concern for the expense and inconvenience of Partnership Law §63 dissolution proceedings should not be used to justify a defeat of legislative intent of guaranteed due process remedies; §§'s 62(1)(d) and 63 should not judicially be made nugatory through an unreported, indeed, unstated, apparent acquiescence to the "at will" defense, more, in context of LLL&M's agreement, expressly one precluding such dissolution except in contravention, and because LLL&M has not implemented any dissolution.

7. Judicial Canons impose impartiality. This record demonstrates the absence of all evidence of any LLL&M dissolution, e.g., the absence of LLL&M compliance with Appellate Division, First Department Rule DR9-102: **D-Required Bookkeeping Records; G-"Dissolution of a Firm"**.

8. Likewise, LLL&M's strategy of litigation by exhaustion has not been impeded. LLL&M presents the "at will" defense as its sole defense. *Conclusively, LLL&M does not contend that AEC has been expelled.* (AEC Bf. Appl. 45). This Court's adjournment from the June, 1992 Term to/until the September, 1992 Term of a dispute which presents a patent sham defense and an **in extremis** Plaintiff-Appellant remains baffling in context of a national law firm's reliance upon such defense notwithstanding contradicted by both statutory law and case law: Partnership Law §§'s 62(1)(d) and 63; *Millet v. Slocum*, 167 NYS2d 136 (AD 4, 1957), **aff'd** 5 NY2d 734, 177 NYS2d 716 (1958). Respectfully, herein incorporated by reference are the papers relating to the adjournment of this appeal from the June, 1992 Term to/until the September, 1992, Term "on the last day...", viz.:

i) LLL&M Motion to Adjourn Appeal to September 1992 Term, dated March 27, 1992;

ii) AEC Motion For a Preference, dated March 30, 1992;

iii) AEC Opposition to LLL&M Motion To Adjourn Appeal dated March 31, 1992;

iv) LLL&M Affirmation in Opposition to AEC Motion For a Preference, dated April 3, 1992;

v) AEC Motion For Reargument and/or Leave To Appeal To The Court of Appeals, dated May 8, 1992; and

vi) AEC Motion For Extension Time, dated June 12, 1992.

9. Similarly, the Court's stated oral argument concern that compensation to AEC in the amount of her contended Memorandum Account balance, i.e., approximately $43,000, constitutes AEC's damages, overlooks that: i) AEC remains entitled to damages for any LLL&M breach of an agreement expressly which prohibits the sole purported defense upon which LLL&M relies, ii) LLL&M's contended "waiver" solely is dependent upon AEC's "death, retirement or withdrawal", indisputably, termination events *not* present in this record; and iii) AEC's claims for damage to her reputation remain grounded upon LLL&M's wilful **de facto** expulsion masquerading as an "at will" dissolution contrivance.

10. Indisputably, this case is at least of statewide significance. Notwithstanding a national law firm's agreement prohibiting "at will" dissolution, excepting in contravention notwithstanding that national law firm's failure in presentation of any evidence for any dissolution "at will" or otherwise, acceptance of LLL&M's "at will" dissolution defense as an "alternative" to admittedly absent express expulsion power irretrievably would make nugatory the Partnership Law and historic partnership principles. Of equal significance, particularly in context of *§63, the statutorily mandated Due Process and Equal Protection remedy*, absent express expulsion power, is the unexplained absence from all reported record of the sole and actual defense presented, LLL&M's unprecedented, absurd reliance upon "at will" dissolution principles to support a "moving on" without an individual partner at a large, national law firm by fiat of that continuing firm's oligarchical, select leadership.

11. This action was commenced on July 2, 1991. **Inter alia**, AEC sought preliminary and permanent injunctive relief, together with a constructive trust and declaratory relief relating to her partnership status, as well the partnership status of LLL&M.

12. AEC's application for injunctive relief was presented

on August 7, 1991. Through voluminous summary judgment motion practice grounded upon a purported "**at will**" dissolution of LLL&M, AEC at 38-40 years of age continues to be precluded from the practice of her profession, continues to be forced into indigency and continues to sustain irreparable harm to her reputation, as well, irreparable harm relating to the absence of medical insurance and/or financial ability to provide the medical assistance recommended for child bearing. Accordingly, incorporated by reference upon this motion are:

i) Record on Appeal, Vol. I of II (pps. 1-503);

ii) Record on Appeal, Vol. II of II (pps. 504-1079);

iii) Brief for Plaintiff-Appellant; and

iv) Brief for Defendants-Respondents.

13. The questions of law to be reviewed by the Court of Appeals are:

1) Do not both the Constitution of the United States and the Constitution of the State of New York provide in the Partnership Law at §§'s 62(1)(d) and 63 the exclusive Due Process and Equal Protection remedies available legitimately concerning partnership "terminations";

2) Should not AEC - a party **in extremis** circumstance since January, 1990 - have been granted preliminary injunctive and/or other relief upon the July 2, 1991, commencement of this action;

3) Should not LLL&M's "at will dissolution" defense, because significant to Partnership Law, have been *publicly* reported as the sole defense presented, thereupon, promptly dismissed grounded upon sham;

4) Has there not been provided unfair advantage to LLL&M upon the Court's adjournment in the manner identified of this appeal from the June, 1992 Term to and until the September, 1992 Term.

WHEREFORE, AEC requests that the Court in order **inter alia** to preclude continuing injury to AEC's reputation and so as to implement the Partnership Law's due process and equal protection remedy, §63, i) modify the June 2, 1992 Order so to grant all relief requested by AEC including preliminary injunctive and/or summary judgment remedy, and ii) grant Leave To Appeal to The Court of Appeals.

Dated: New York, New York
October 14, 1992

S/Daniel J. O'Callaghan
Daniel J. O'Callaghan

NEW YORK LAW JOURNAL
MONDAY, OCTOBER 5, 1992
VOLUME 208 - NO. 67

TODAY'S NEWS

Update

LeBoeuf, Lamb, Leiby & MacRae erred in terminating Partner Alison E. Clapp in 1989 by dissolving the firm and reconstituting it without Ms. Clapp, her attorney and husband Daniel J. O'Callaghan told the Appellate Division, First Department, on Friday. Ms. Clapp is appealing the dismissal of her case by Justice Diane A. Lebedeff of Manhattan Supreme Court. Mr. O'Callaghan claimed that since the firm's partnership agreement lacked an expulsion clause, judicial intervention was required to dissolve the firm. Christopher J. Sullivan of Herrick, Feinstein, representing LeBoeuf, maintained that New York law did not prohibit the termination.

Ex T

APPENDIX M - NOTICE OF APPEAL FROM ORDER OF APPELLATE DIVISION, ENTERED DECEMBER 15, 1992, AFFIRMING JUDGMENT OF SUPREME COURT, ENTERED MARCH 18, 1992, IN FAVOR OF DEFENDANTS GRANTING SUMMARY JUDGMENT AND DISMISSING THE COMPLAINTS

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

ALISON E. CLAPP,

Plaintiff,

- against-

LeBOEUF, LAMB, LEIBY & MacRAE, et al.,

Defendants.

NOTICE OF APPEAL
Index No. 15586/91
Consolidated with
Index No. 21194/91

S I R S:

PLEASE TAKE NOTICE that the Plaintiff appeals to the Court of Appeals of the State of New York from an order of the Appellate Division, First Department, entered in the office of the of the Clerk of the Appellate Division on December 15, 1992, which order affirms the judgment of the Supreme Court in this action, entered in the office of the Clerk of the County of New York on March 18, 1992, in favor of Defendants granting summary judgment and dismissing the complaints.

PLEASE TAKE FURTHER NOTICE that the Plaintiff appeals from each and every part of the order of the Appellate Division of the Supreme Court, as well as from the whole thereof.

Dated: New York, New York
February 17, 1993

Yours,
Daniel J. O'Callaghan
Attorney for Plaintiff
17 Battery Place
New York, NY 10004
(212) 222-4200

TO: Herrick, Feinstein
Attorney for Defendants
2 Park Avenue
New York, NY 10016
(212) 684-1400

Clerk of the Court
Supreme Court of the State
of New York
60 Centre Street
New York, NY 10007

APPENDIX N - NOTICE OF MOTION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS, FILED IN THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT, DATED FEBRUARY 17, 1993

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

ALISON E. CLAPP,

Plaintiff-Appellant,

- against-

LeBOEUF, LAMB, LEIBY & MacRAE, et al.,

Defendants-Respondents.

N.Y. County Clerk's
Index No. 15586/91

NOTICE OF MOTION FOR
LEAVE TO APPEAL TO THE COURT OF APPEALS

PLEASE TAKE NOTICE that upon the annexed affirmation of Daniel J. O'Callaghan, dated February 17, 1993, and the exhibits annexed thereto, the Plaintiff-Appellant will move this Court at a term thereof to he held at the Courthouse, 27 Madison Avenue, New York, New York, on March 2, 1993, at 10 a.m., or as soon thereafter as counsel may he heard for Leave To Appeal To The Court Of Appeals and an order granting such other and further relief as the Court may deem just and proper.

Dated: New York, New York
February 17, 1993

DANIEL J. O'CALLAGHAN
Attorney for Plaintiff-
Appellant
17 Battery Place
New York, NY 10004
(212) 222-4200

TO: HERRICK, FEINSTEIN
Attorney for Defendants-
Respondents
2 Park Avenue
New York, New York 10016
(212) 684-1400

APPENDIX O - AFFIRMATION IN SUPPORT OF MOTION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS, FILED IN THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT, DATED FEBRUARY 17, 1993

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

ALISON E. CLAPP,

Plaintiff-Appellant,

- against-

LeBOEUF, LAMB, LEIBY & MacRAE, et al.,

Defendants-Respondents.

N.Y. County Clerk's
Index No. 15586/91

AFFIRMATION IN SUPPORT OF MOTION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS

DANIEL J. O'CALLAGHAN, an attorney admitted to practice before the Courts of the State of New York, affirms the following to be true under penalty of perjury:

1. I am the attorney for Plaintiff-Appellant, Alison E. Clapp ("**AEC**") in the above-captioned action and I am fully familiar with the facts stated herein.

2. I submit this affirmation in support of AEC's motion for Leave to Appeal to the Court of Appeals from the Order of the Appellate Division, First Department entered on December 15, 1992, and served upon AEC by Notice of Entry

dated January 20, 1993. (Copy of Court's December 15, 1992, Order annexed as "**Ex. U**").

3. By Motion dated October 14, 1992, AEC sought modification, Etc. of the Court's June 2, 1992, Order ("**Motion For Modification, Etc.**") including a request for Leave to Appeal to the Court of Appeals, with a listing of questions of law to be reviewed by the Court of Appeals. Upon this application, AEC includes all submissions and incorporations by reference contained upon the Motion For Modification, Etc., including the said listing of questions. (Copy of AEC Motion For Modification, Etc. dated October 14, 1992, annexed as "**Ex. V**").

4. Upon full reservation of her rights upon this application for leave to appeal, AEC advises that by Notice of Appeal served February 17, 1993, pursuant to CPLR Sec. 5601(b)(1), AEC has taken an appeal to the Court of Appeals as of right.

5. In addition to the questions of law identified in AEC's Motion for Modification, Etc., upon this application AEC requests that these questions of law also be reviewed by the Court of Appeals:

1. Are not the provisions of Partnership Law Sec. 62(1)(b) unconstitutional as herein implemented against AEC by LLLL&M, a national law firm, because in violation of AEC's Due Process and Equal Protection rights to the continuing enjoyment of AEC's liberty and property interests in the LLL&M Partnership?

2. Are not the provisions of Partnership Law Sec. 63 unconstitutional as herein implemented against AEC by LLL&M, a national law firm, because in violation of AEC's Due Process and Equal Protection rights to the continuing enjoyment of AEC's liberty and property interests in the LLL&M Partnership?

3. Are not the provisions of Partnership Law Secs. 66-69 unconstitutional as herein implemented against AEC by LLL&M, a national law firm, because in violation of AEC's Due Process and Equal Protection rights to the continuing enjoyment of AEC's liberty and property interests in the LLL&M Partnership?

4. Has not AEC unconstitutionally been denied Due Process and Equal Protection of the laws in consequence of the complete denial to her of all disclosure concerning all LLL&M defenses, particularly that defense contended as "at will" dissolution, as "policy" or otherwise?

5. Has not AEC unconstitutionally been denied Due Process and Equal Protection of the laws in consequence of the complete denial to her of all disclosure concerning all causes of action alleged in the Legal and Equitable Complaints so as to preclude to AEC all judicial process to establish from LLL&M sources that LLL&M's "at will" defense is a sham and a contrivance and has been presented in bad faith?

WHEREFORE, in order **inter alia** to preclude the continuing injury to AEC's reputation and so as to implement the Partnership Law's Due Process and Equal Protection remedy, Sec. 63, AEC requests that the Court grant Leave To Appeal to The Court of Appeals.

Dated: New York, New York
February 17, 1993

S/Daniel J. O'Callaghan
Daniel J. O'Callaghan

APPENDIX P - PETITIONER'S JURISDICTIONAL STATEMENT SUBMITTED TO THE NEW YORK STATE COURT OF APPEALS, DATED MARCH 12, 1993

DANIEL J. O'CALLAGHAN
ATTORNEY AT LAW
17 BATTERY PLACE
NEW YORK, N.Y. 10004

212-222-4200

TELECOPIER: 212-222-4205

March 12, 1993

Hon. Donald M. Sheraw
Clerk of the Court
Court of Appeals
20 Eagle Street
Albany, NY 12207

Re: *Clapp v. LeBoeuf, Lamb, Leiby & MacRae, et al.*
New York County Index No. 15586/91

Dear Mr. Sheraw:

I am the attorney for Appellant Alison E. Clapp ("**Appellant**"). This letter is submitted in accordance with the request made in your letter of March 2, 1993, for comments justifying the retention of subject matter jurisdiction. Enclosed is a copy of each brief filed in the Appellate Division (two), a copy of the Record on Appeal to that Court and a copy of the motion and orders entered during the course of the appeal.

This letter includes citations to references demonstrating that pursuant to CPLR §5601 an appeal of right is presented from an Order of the Appellate Division which finally has determined "an *action* where there is directly involved the construction of

the constitution of the state or of the United States". The complete denial of Appellant's rights to Due Process and Equal Protection demonstrated pervasively in this action not only provides ample grounds for this appeal of right but also supports a grant to her of prompt relief upon review of this letter and its enclosures.

In 1981, Appellant, then 30 years of age, became employed as an associate attorney in LLL&M's Tax Department (R. 375). In 1986, upon Appellant's execution of the Partnership Agreement ("**Agreement**"), purportedly Appellant was "admitted" to membership in LLL&M; it is *uncontested* by LLL&M that the Agreement does *not* contain express expulsion power. (R. 697, 910, 1042-44). Rather, LLL&M, by its two person leadership, solely contends that an "alternative" is available and has been implemented, viz., an "**as of**" December 31, 1989, "at will" dissolution of "the Firm", coincident with the Firm's "**as of**" January 1, 1990, "re-constitution" into a "new" partnership, with all former (approximately 132) LLL&M members ***excepting Appellant*** continuing in the "re-constituted" firm (excepting those partners who in 1990 were newly-admitted, or who upon leaving expressly executed an Agreement ¶8(c) "withdrawal," i.e. that former partner's represented "consensual" change in membership).

Consistently, Appellant has contended that (i) Partnership Law does not authorize dissolution "at will" as an alternative to express expulsion power, here, admittedly absent and (ii) dissolution "at will" is a right which authorizes withdrawal by a partner, not authority for the self-help **de facto** expulsion of *another* partner. Moreover, Appellant has contended that evidence is absent of any "withdrawal" by any "former Firm" partner and that LLL&M has not presented evidence of *any* dissolution, "at will" or otherwise, but rather, that the defense remains a sham. (R. 67-77, 79-84, 363-68, 422-28, 430-31, 448-58, 585(a)-585(y), 716-26, 934-38, 1072-77).

Under established precedent:

> ***Partners have no common law or statutory right to expel or dismiss another partner from a partnership.***

> **They may, however, provide in their partnership agreement for expulsion under *prescribed conditions which must be strictly applied*.**

Millet v. Slocum, 167 NYS2d 136 (AD 4, 1957), **aff'd** 5 NY2d 734, 177 NYS2d 716 (1958). (Emphasis added).

LLL&M's reliance upon Partnership Law §62 1(b) is invalid since it presents: the simultaneous (i) subverting and making nugatory of §§62 1(d) and 63; and (ii) the making irrelevant of numerous other provisions, e.g. §§60-69 and 80-81. Is anarchy to replace partnership fiduciary duty as one partner "at will's" another, in turn, him/herself "at willed", until all are "at willed"; thereupon, the partnership "re-constituted", then "re-constituted" **ad infinitum** with all professional reputations and business relations "at will" destroyed, all firm and individual assets at will "available" to the earliest or most ruthless in reliance upon such unbridled "right", indeed, all third-party and governmental interests silently altered "at will"? No partner, no partnership "assumes the risk" of such irrationality. No purpose is served by this "alternative" - excepting LLL&M's avoidance for three (3) years of accountability. Simply, the "defense" is an absurdity, contrary to the actual purpose for which legitimate "at will" dissolution was intended - i.e. the civilized, rational "withdrawal" of *a* partner - but not of 132 - who thereupon, may not be held hostage to a firm he/she no longer wants, thus, publicly establishing rights and obligations in consequence of the changed relationship. More, the defense does not authorize the "reconstitution" of a "new" entity upon the union of such "withdrawing" partner with all others remaining from the former entity, excepting one, e.g., Appellant. Such **de facto** wrongful expulsion is a denial of §63 Due Process and Equal Protection remedies; the making nugatory of §§62(l)(d) and 63.

In rational and obvious contradiction to LLL&M's contention for replacement of fiduciary duty with chaos, the Partnership Law *requires* that expulsion be express, that it strictly be construed. Thereafter, in the absence of express expulsion power (or correlative to its implementation), real "alternatives",

§63 remedies, are provided to assure civilized ***due process*** procedures for disgruntled partners - a sane mechanism for resolution of conflicting interests. Absent express expulsion power, LLL&M's remedy should not have been self-help, but §63 remedies; absent express expulsion power, Appellant's interests should not have been made subject to LLL&M compulsion, rather, §63 due process.

In truth, a partnership "at will" may *not* be dissolved at any time without consequence, e.g., (i) *not* when the purported dissolution is a contrivance implementing self-help so as to avoid summary judgment because absent express expulsion power, (ii) *not* when "at will" dissolution is prohibited in the Agreement, as here, and (iii) *not* when not a "dissolution", but rather a hoax because the purportedly "dissolving partner(s)" remain, have not "withdrawn" from "the Firm".

Consistent with Appellant's presentation of Due Process and Equal Protection issues involved in this action, **inter alia**, Appellant presented to the Appellate Division an appeal upon the following questions in the following sequence:

QUESTIONS PRESENTED

1. Does a purported dissolution "at will" of a 132 member national law firm provide an alternative means for termination of a partner without necessity for Partnership Law **§63 due process** and notwithstanding admittedly absent **§62(1)(d)** express expulsion power,

   The Court below did *not* answer this question.

2. Absent evidence of any partner(s) withdrawal, has not the "Firm" "at will" or otherwise not been dissolved?

   The Court below did *not* answer this question.

3. Does not the Agreement prohibit "at will"

dissolution?

The Court below did *not* answer this question.

4. Does not the evidence establish that purported "at will" dissolution(s) and next day "reconstitution(s)" effective "**as of**"... both dates, as "policy", annually or otherwise, is a sham?

The Court below did *not* answer this question.

5. Has there not been a failure to prove any "dissolution", "at will" or otherwise?

The Court below did *not* answer this question...

There follows reference to the constitutional issues: R. 83-84, 92-93, 102-03, 272, 274, 330-332, 347-48, 367, 371, 378-79, 393, 464-77, 579, 582-84, 719-24, 792, 937, 955, 1020-21, 1073-1076.

Concerning the Appellate Division's discretionary decisions, there is additionally referenced the following matters included in the **Index of Exhibits**: Ex. 2 (Motion for Preference, Ex. C, p. 2-3); Ex. 5 (Reply - Support of Preference p. 2); Ex. 7 (Motion/Reargument, etc. p.3) ; Ex. 9 (Motion for Extension, p. 2); Ex. 11 (Motion for Modification, etc. p. 1-5). Appellant's Brief at **Points I - VIII, X, XIV-XVII** addresses the constitutional issues identified in the Jurisdictional Statement.

Upon this appeal, there is sought (i) public recognition of LLL&M's contention for the availability and implementation of the "at will" dissolution defense, (ii) coincident with the defense's prompt rejection, (iii) the enforcement of Partnership Law §§'s 62(1)(d) and §63 requirements and (iv) the allowance for CPLR §§'s 3212(f) and 3214(b) disclosure. This outcome demonstrates that Appellant is entitled to reversal of the Appellate Division's Order upon these different answers to the referenced Constitutional questions.

Indeed, it is inconceivable that the Appellate Division's Order can rest on *any* alternative ground except the contended "at will" dissolution defense, itself, upon these facts, an unconstitutional subversion of the absence of expulsion power, a destruction of Appellant's reputation, a taking of her property without Due Process of Law and *alone* to this Appellant application of the *un*equal protection of the laws. **Appellant has not had one day of discovery in this dispute**.

There is annexed a copy of a report in **The New York Times** dated March 9, 1993, relevant to the Constitutional issues here presented. Must Appellant appear in partnership cases throughout the United States so as to explain to all the invincibility of LLL&M's defense and the inappropriateness of any partnership dispute in any State, or, now, after three (3) years, shall there be a judicial restoration to Appellant of her good reputation?

For these reasons, respectfully, it is submitted that there are substantial Constitutional issues raised upon this appeal of right.

Respectfully submitted,

/Signature_____
Daniel J. O'Callaghan
Attorney for Appellant
ALISON E. CLAPP
17 Battery Place
New York, NY 10004

DJOC: wr
cc : Herrick, Feinstein, w/out encl.,
except Index of Exhibits encl.

THE NEW YORK TIMES, TUESDAY, MARCH 9,1993

Two Officers Of Sunbeam File Lawsuit

Seek to Strip Control
From Ousted Chairman

By ADAM BRYANT

Two executives of the Sunbeam-Oster Company took legal action yesterday in an effort to dissolve a partnership that gives the company's former chairman and chief executive, Paul B. Kazarian, some control over Sunbeam affairs.

The suit, filed in Superior Court in Rhode Island, represents the latest chapter in a murky tale that began in mid-January with the surprising ouster of Mr. Kazarian, who was widely credited with engineering a rapid turnaround of the once-bankrupt consumer-products company.

The reasons for Mr. Kazarian's ouster remain unclear. While employees have said anonymously that their former boss was dismissed because of his erratic behavior and hard-driving management style, Mr. Kazarian has countered that employees organized a coup out of fear that they would lose their jobs and stock options for failing to meet his high performance standards.

Court Order

In the Rhode Island court yesterday, Michael G. Lederman, Sunbeam's general counsel, and Robert H. Setrakian, chief financial officer, won an order that Mr. Kazarian said required him to notify his partners of any action that might affect their three-man partnership, known as Japonica Partners. Mr. Lederman described the ruling as a temporary restraining order.

Japonica was formed years several years ago to bring the former Allegheny International out of bankruptcy as Sunbeam-Oster. The money owed Japonica by the original investors in Sunbeam-Oster has been estimated at $200 million, based on the

enormous gains in the company's fortunes.

Since January, the three partners have disputed how large each of their stakes should be in Japonica. Mr. Kazarian says he is entitled to nearly all of Japonica's assets; the other partners say they are owed larger shares of its profits. Mr. Lederman and Mr. Setrakian are trying to dissolve the partnership, thereby leaving the courts to distribute Japonica's assets.

The possibility of Japonica's dissolution has broad implications for Sunbeam-Oster. As the managing partner of Japonica, Mr. Kazarian holds veto power over certain actions by Sunbeam-Oster Equities, the limited partnership that holds 77 percent of Sunbeam-Oster's stock.

Japonica holds one of three seats on the management committee of Sunbeam-Oster Equities. The other members of that committee represent the interests of two investors, Michael Price and Michael Steinhardt. They could not be reached for comment last night.

"This is the path of disentangling

Two members want to dissolve a partnership.

Paul from the company," Mr. Lederman said. "It could lead to restructuring" of the Sunbeam-Oster Equities partnership, he added.

The court action yesterday represented an amendment to a suit filed in January by Mr. Lederman and Mr. Setrakian. In that suit, they contended that Mr. Kazarian "purported to agree" to increase their stakes in Japonica, giving Mr. Lederman a 25 percent interest in Japonica and Mr. Setrakian a 10 percent stake.

They also contended in their original suit that Mr. Kazarian tried to turn them against each other by holding out the promise of a greater share for each. Mr. Kazarian has time and again cited documents filed with the Securities and Exchange Commission that note his control over Japonica.

APPENDIX Q - MEMORANDUM IN SUPPORT OF PLAINTIFF-APPELLANT'S MOTION FOR REARGUMENT OF MOTION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS DATED JULY 20, 1994

COURT OF APPEALS
STATE OF NEW YORK

ALISON E. CLAPP,
Appellant,

-against-

LeBOEUF, LAMB, LEIBY & MacRAE, et al.,

Respondents.

New York County
Index No. 15586/91
Consolidated with
Index No. 21194/91

MEMORANDUM

IN SUPPORT OF PLAINTIFF-APPELLANT'S MOTION FOR REARGUMENT OF MOTION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS

On May 6, 1993, the Court dismissed Plaintiff-Appellant's, Alison E. Clapp's ("**AEC**'s") appeal of right "upon the ground that no substantial constitutional question is directly involved". Additionally, the Court on June 21, 1994, denied AEC's motion for Leave to Appeal.

Respectfully, reargument is requested particularly

concerning points overlooked or misapprehended by the Court relating to AEC's due process rights. In sum, the Court is asked to grant reargument grounded upon the principles asserted in AEC's moving papers which address these fundamental concerns:

> [I]n *Monroe v. Pape* [365 U.S. 167, 183, 5 L.Ed. 49 (1961)]... the Court inferred that Congress had intended a federal remedy in three circumstances: where state substantive law was facially unconstitutional, where state procedural law was inadequate to allow full litigation of a constitutional claim, and where state procedural law, though adequate in theory, was inadequate in practice... In short, the federal courts could step in where the state courts were unable or unwilling to protect federal rights....

Allen v. McCurry, 449 U.S. 90, 100, 101 S.Ct. 411, 418 (1980). The Court's denial of AEC's motion for Leave to Appeal supports a contention for repugnancy of Partnership Law statutes as identified in this proceeding, e.g., §§62(1)(d), 63 and 80-81, in context of a denial of AEC's due process rights. Now, in consequence of this Court's denial of appeal, any partner in a partnership, especially in a national law partnership, may disregard "at will" all requirement for §§80-81 dissolution certificate filing and publication, disregard all §63 due process obligation, avoid the absence of §62 expulsion power "strictly applied" (*Millet v. Slocum*, 167 NYS2d 136 (AD 4 Dept., 1957), **aff'd** 5 NY2d 734, 177 NYS2d 716 (Ct.App. 1958)) and avoid all disclosure concerning any of these issues. Rather, such partnership simply may imagine a dissolution and thereby "acquire" all of the now former partner's business and partnership interests and exclude that partner with consequential destruction of livelihood and reputation - indeed, all "at will". The simple statement of the absurdity of acceptance of this contrivance demonstrates its unreality and also explains the consistent failure in all public record even of the defense's contention. As stated in *Del's Big Saver Foods, Inc. v. Carpenter Cook, Inc.*, 795 F.2d 1344 at 1346 (7th Cir. 1986):

> "A state cannot avoid its obligations under the due process clause by delegating to private persons the authority to deprive people of their property without due process of

law."

Further, denial to AEC of review in this Court of grievances sustained in consequence of LLL&M's "at will" contention is not in accord with the most recent United States Supreme Court decision relevant to partnership dissolution. In *Wyatt v. Cole*, __ U.S.__, 118 L.Ed.2d 504, 509-10 (1992), the Supreme Court reviewed these facts:

> This dispute arises out of a soured cattle partnership.... [R]espondent ... Cole *sought to dissolve his partnership* with petitioner ... Wyatt. *When no agreement could be reached*, Cole ... filed a state court complaint *in replevin* against Wyatt .... (Emphasis added.)

Obviously, Cole, like LLL&M, and like the Supreme Court in *Wyatt*, remained unaware that according to LLL&M, an *invincible* remedy had been available as an alternative which would have compelled avoidance of all concern for Supreme Court precedent strictly limiting pre-judgment remedies, e.g., **see** *Fuentes v. Shevin*, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed. 556 (1972). Indeed, according to LLL&M, the "at will" principle should have precluded review of *Wyatt* by the Supreme Court, indeed, should have precluded review by the Federal District Court concerning the *Wyatt* two-person partnership dispute. Now, in consequence of any acceptance of LLL&M's contention for an invincible "at will" principle, heretofore settled Partnership Law statutes, e.g., §§62(1)(d), 63 and 80-81, have been held not to apply: the "at will" principle, to the exclusion of all other law, has assured LLL&M a legal, complete, and silent extinguishment of AEC's - or any other partner's interests - at any time, for any or no reason and all without any disclosure. Indeed, in the words of LLL&M's counsel, "They [LLL&M] could tell her to leave if she wore the

wrong color dress." [R 352, in prior Federal action.] The ineluctable consequence of any legitimacy given to the "at will" principle, as contended by LLL&M, at least is the simultaneous making of *Wyatt* both irrelevant and superfluous. This Court is requested to grant reargument.

CONCLUSION

AEC requests that this application for reargument of the Motion for Leave to Appeal to the Court of Appeals be granted.

Dated: New York, New York
July 20, 1994

Yours,

Daniel J. O'Callaghan
Attorney for Plaintiff-Appellant
ALISON E. CLAPP
17 Battery Place, Suite 314
New York, New York 10004
(212) 222-4200

TO: Herrick, Feinstein
Attorneys for Defendants-
Respondents
LeBOEUF, LAMB, LEIBY
& MacRAE, et al.
2 Park Avenue
New York, New York 10016
(212) 684-1400

and

Clerk of the Court of Appeals
20 Eagle Street
Albany, New York 12207

APPENDIX R - UNITED STATES CONSTITUTION FOURTEENTH AMENDMENT, IN PERTINENT PART

Section 1. .... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws. ....

APPENDIX S - NEW YORK STATE PARTNERSHIP LAW EXCERPTS

ARTICLE 6 - DISSOLUTION AND WINDING UP

* * *

§61. Partnership not terminated by dissolution

On dissolution the partnership is not terminated, but continues until the winding up of partnership affairs is completed.

§62. Causes of dissolution

Dissolution is caused:

1. Without violation of the agreement between the partners,

(a) By the termination of the definite term or particular undertaking specified in the agreement,

(b) By the express will of any partner when no definite term or particular undertaking is specified,

(c) By the express will of all the partners who have not assigned their interests or suffered them to be charged for their separate debts, either before or after the termination of any specified term or particular undertaking,

(d) By the expulsion of any partner from the business bona

fide in accordance with such a power conferred by the agreement between the partners;

2. In contravention of the agreement between the partners, where the circumstances do not permit a dissolution under any other provision of this section, by the express will of any partner at any time;

3. By any event which makes it unlawful for the business of the partnership to be carried on or for the members to carry it on in partnership;

4. By the death of any partner;

5. By the bankruptcy of any partner or the partnership;

6. By decree of court under section sixty-three.

§63. Dissolution by decree of court

The court shall decree a dissolution.

1. On application by or for a partner whenever:

(a) A partner has been declared incompetent in any judicial proceeding or is shown to be of unsound mind,

(b) A partner becomes in any other way incapable of performing his part of the partnership contract,

(c) A partner has been guilty of such conduct as tends to affect prejudicially the carrying on of the business,

(d) A partner wilfully or persistently commits a breach of the partnership agreement, or otherwise so conducts himself in matters relating to the partnership business that it is not reasonably practicable to carry on the business in partnership with him,

(e) The business of the partnership can only be carried on at a loss,

(f) Other circumstances render a dissolution equitable;

2. On the application of the purchaser of a partner's interest under sections fifty-three or fifty-four:

(a) After the termination of the specified term or particular undertaking,

(b) At any time if the partnership was a partnership at will when the interest was assigned or when the charging order was issued.

* * *

§ 68. Right to wind up

Unless otherwise agreed the partners who have not wrongfully
dissolved the partnership or the legal representative of the last surviving partner, not bankrupt, has the right to wind up the partnership affairs; provided, however, that any partner, his legal representative, or his assignee, upon cause shown, may obtain winding up by the court.

§69. Rights of partners to application of partnership property

1. When dissolution is caused in any way, except in contravention of the partnership agreement, each partner, as against his copartners and all persons claiming through them in respect of their interest in the partnership, unless otherwise agreed, may have the partnership property applied to discharge its liabilities, and the surplus applied to pay in cash the net amount owing to the respective partners. But if dissolution is caused by expulsion of a partner, bona fide under the partnership agreement, and if the expelled partner is discharged from all partnership liabilities, either by payment or agreement under section sixty-seven, subdivision two, he shall receive in cash only the net amount due him from the partnership.

2. When dissolution is caused in contravention of the partnership agreement the rights of the partners shall be as follows:

(a) Each partner who has not caused dissolution wrongfully shall have,

(I) All the rights specified in subdivision one of this section, and

(II) The right, as against each partner who has caused the dissolution wrongfully, to damages for breach of the agreement.

(b) The partners who have not caused the dissolution wrongfully, if they all desire to continue the business in the same name, either by themselves or jointly with others, may do so, during the agreed term for the partnership and for that purpose may possess the partnership property, provided they secure the payment by bond approved by the court, or pay to any partner who has caused the dissolution wrongfully, the value of his interest in the partnership at the dissolution, less any damages recoverable under clause (II) of paragraph (a) of subdivision two of this section, and in like manner indemnify him against all present or future partnership liabilities.

(c) A partner who has caused the dissolution wrongfully shall have:

(I) If the business is not continued under the provisions of paragraph (b) of subdivision two of this section all the rights of a partner under subdivision (1), subject to clause (II) of paragraph (a) of subdivision two, of this section.

(II) If the business is continued under paragraph (b) of subdivision two of this section the right as against his copartners and all claiming through them in respect of their interest in the partnership, to have the value of his interest in the partnership, less any damages caused to his copartners by the dissolution, ascertained and paid to him in cash, or the payment secured by bond approved by the court, and to be released from all existing liabilities of the partnership; but in ascertaining the value of the partner's interest the value of the good-will of the business shall not be considered.

ARTICLE 7 - BUSINESS AND PARTNERSHIP NAMES

§80. When partnership or business name may be continued

The use of a partnership or a business name may be continued in either of the following cases:

1. Where the business of any firm or partnership in this state, having business relations with foreign countries or which has transacted business in this state or in any other state or territory of the United States continues to be conducted by some or any of the partners, their or any of their assignees, appointees or successors in interest.

2. Where any partnership shall hereafter be formed under the laws of this state it may use the firm or corporate name of any general or limited partnership or of any corporation, domestic or foreign, which may theretofore have carried on its business within this state, where said general or limited partnership or corporation has discontinued or shall be about to discontinue its business within the state, and where a majority of the partners, general or special, in either of such last mentioned copartnerships or of the survivors thereof shall be members of the new copartnership, or where a majority of the members of such copartnership theretofore existing or of the surviving members thereof, or where stockholders holding a majority of the stock of such corporation shall consent in writing to the use of such firm or corporate name by such new copartnership; or

3. Where any resident of this state dies, who at the time of his death and for at least five years immediately prior thereto, conducted and carried on in his sole name, any business in this state, or who at the time of his death, so conducted and carried on any business having relation with other states or foreign countries, the right to use the name of such person, for the purpose of continuing and carrying on such business, shall survive and pass and be disposed of and accounted for as a part of the personal estate of such deceased person, and such business may be continued and carried on under such name by any person who comes into the legal possession thereof.

§81. Certificate to be filed

Whenever a partnership or business name continues to be used as provided by section eighty, the person or persons using such name shall sign and acknowledge or swear to a certificate, declaring the person or persons intending to deal under such name, with their respective places of residence, and file the same in the clerk's office of the county where the principal place of business is located, and cause a copy of such certificate to be published once in each week for four consecutive weeks in a newspaper of the city or town in which such principal place of business is located, or if none be published in such city or town, in the newspaper nearest thereto. A county clerk with whom any such certificate is filed, shall keep a register in which shall be entered in alphabetical order the name of every such partnership and of the partners thereof, and every such business name of a deceased person and the names of the person filing certificates therefor.

APPENDIX T - N.Y. Civ. Prac. L. & R. ("CPLR")

Rule 2219. Time and form of order

(a) Time and form of order determining motion, generally. An order determining a motion relating to a provisional remedy shall be made within twenty days, and an order determining any other motion shall be made within sixty days, after the motion is submitted for decision. The order shall be in writing and shall be the same in form whether made by a court or a judge out of court. An order determining a motion made upon supporting papers shall be signed with the judge's signature or initials by the judge who made it, state the court of which he is a judge and the place and date of the signature, recite the papers used on the motion, and give the determination or direction in such detail as the judge deems proper.

* * *

Rule 3212. Motion for summary judgment

(a) Time; kind of action. Any party may move for summary judgment in any action, after issue has been joined.

* * *

(f) Facts unavailable to opposing party. Should it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just.

* * *

Rule 3214. Motions heard by judge supervising disclosure; stay of disclosure

* * *

(b) Stay of disclosure. Service of a notice of motion under rule 3211, 3212, or section 3213 stays disclosure until determination of the motion unless the court orders otherwise.

APPENDIX U - AFFIRMATION OF DANIEL J. O'CALLAGHAN DATED JULY 6, 1990 IN SUPPORT OF PLAINTIFF'S ORDER TO SHOW CAUSE IN FEDERAL ACTION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ALISON E. CLAPP,
Plaintiff-Appellant,

- against-

LeBOEUF, LAMB, LEIBY & MacRAE, et al.,
Defendants-Respondents.

90 Civ. 1690 (RPP)

SUPPLEMENTAL AFFIRMATION IN SUPPORT OF RULE 65 RELIEF: PRELIMINARY AND PERMANENT INJUNCTION AND TEMPORARY RESTRAINING ORDER

I, Daniel J. O'Callaghan, attorney on behalf of Plaintiff, Alison E. Clapp, do affirm under penalty of perjury the following matters. I submit this Affirmation in support of relief as outlined herein pursuant to FRCP Rule 65 granting a preliminary and permanent injunction and temporary restraining order supplementing the application for said relief submitted pursuant to my affirmations dated May 25, 1990, June 13, 1990, and June 27, 1990, and the affidavits of Plaintiff, dated May 25, 1990, June 22, 1990, and June 29, 1990.

1. Defendants' sole affidavit contention in defense of their conduct concerning Plaintiff's partnership and ERISA status, viz., Donald J. Greene's ("Greene's") Aff'd ¶17 statement that: "Consequently, the partnership was dissolved as of December 31, 1989 and a new partnership formed", is belied by the facts.

(Emphasis added).

2. I have attended at the Clerk's office, New York County, and have reviewed the County Clerk's register relating to compliance with Partnership Law §81, i.e. requirement for the filing therein and publication by continuing partners or successors in interest to a partnership of a certificate so to authorize continued use of the partnership's name. The County Clerk's register during the period January 1, 1989, through today does not record the filing of any such certificate by the "new" partnership identified by Greene, notwithstanding that such certificate is required to be filed so to authorize continuance of the "LeBoeuf, Lamb, Leiby & MacRae" name.

3. Plaintiff has a continuing partnership interest in the continued use of this name. Hereby, Plaintiff supplements her request for injunctive relief to require discontinuance in use of this name by the "new" partnership entity represented by Greene to be in existence, at least until such new entity, if in existence, complies with Partnership Law §81, together with request for damages as a result of Defendants' use and continuing use of this name in contravention of Plaintiff's partnership interests and damages for Defendants failure to compensate Plaintiff for the continuing unauthorized acquisition of her partnership interests.

Dated: New York, New York
July 6, 1990

S/Daniel J. O'Callaghan
DANIEL J. O'CALLAGHAN
Attorney for Plaintiff, 7691
Alison E. Clapp
230 Park Avenue
New York, New York 10169
(212) 370-1000

APPENDIX V - CERTIFICATE OF CONTINUED USE OF *LEBOEUF LAMB, LEIBY & MACRAE* PARTNERSHIP NAME DATED JUNE 22, 1977

CERTIFICATE OF CONTINUED USE
OF PARTNERSHIP NAME OF
LeBoeuf, Lamb, Leiby & MacRae
140 Broadway, New York, New York 10005
(Pursuant to Article 7 of the Partnership
Law of the State of New York)

WHEREAS, the business of the firm of LeBoeuf, Lamb, Leiby & MacRae, a firm which has transacted business in this State, continues to be conducted by some of the partners therein, who were Partners in such firm.

NOW, THEREFORE, the undersigned, in pursuance of Section 81 of the Partnership Law of the State of New York, do hereby make,sign and acknowledge this certificate and do hereby declare that the persons intending to deal under such name, with their respective places of residence set forth after their names, are as follows:

Leon A. Allen, Jr., 530 East 86th Street, New York, New York 10028

Joseph E. Bachelder, III, 226 Constitution Drive, Princeton, New Jersey 08540

Ernest S. Ballard, Jr., 120 East 75th Street, New York, New York 10021

G.S. Peter Bergen, 7 Richards Road, Port Washington, New York 11050

Geoffry D.C. Best, 2 Charlton Street, New York, New York 10014

David P. Bicks, 21 East 87th Street, New York, New York 10028

Taylor R. Briggs, Brookside Cottage, Tuxedo Park, New York 10987

Charles N. Burger, 37 West 12th Street, New York, New York 10011

Thomas E. Burke, 174 Fox Hollow Road, Wykoff, New Jersey 07481

Roger D. Feldman, 18 Oxford Street, Chevy Chase, Maryland 20015

Eugene R. Fidell, 5319 Worthington Drive, Bethesda, Maryland 20016

Jacob Friedlander, 95 Christopher Street, New York, New York 10014

Donald J. Greene, 22 Cherry Street, Douglaston, New York 11363

James A. Greer, II, 91 Central Park West, New York, New York 10023

John L. Grose, 27 The Glen, Laurel Lane, Locust Valley, New York 11560

Douglas W. Hawes, 755 Park Avenue, New York, New York 10021

Carl D. Hobelman, 480 Park Avenue, New York, New York 10022

Michael Iovenko, 26 East 93rd Street, New York, New York 10028

James F. Johnson, 4th, 5 Fernwood Road, Summit, New Jersey 07901

Ronald D. Jones, 830 Park Avenue, New York, New York

10021

Lex K. Larson, 6616 River Trail Court, Bethesda, Maryland 20034

Grant S. Lewis, 2 Fifth Avenue, New York, New York 10011

Cameron F. MacRae, 200 East 66th Street, New York, New York 10021

Cameron F. MacRae, III, 163 East 81st Street, New York, New York 10028

Gerard A. Maher, 12 Old Brook Road, Dix Hills, New York 11746

Sheila H. Marshall, 969 Park Avenue, New York, New York 10028

James G. McElroy, 829 Summit Avenue, Westfield, New Jersey 07090

James P. McGranery, Jr., 3207 M Street, N.W., Washington, D.C. 20007

Philip Palmer McGuigan, 211 East 70th Street, New York New York 10021

James O'Malley, Jr., 131 E. 69th Street, New York, New York 10021

J. Michael Parish, 16 W. 77th Street, New York, New York 10024

John A. Rudy, 25 Fifth Avenue, New York, New York 10003

Paul G. Russell, 45 E. 62nd Street, New York, New York 10021

Harold M. Seidel, 62 Midland Boulevard, Maplewood, New Jersey 07040

Charles P. Sifton, 116 Willow Street, Brooklyn, New York 11202

Halcyon G. Skinner, 43 Crosshill Road, Hartsdale, New York 10530

Joseph S. Strauss, 430 West 250th Street, Bronx, New York 10471

Samuel M. Sugden, 197 Chestnut Ridge Road, Saddle River, New Jersey 07458

Eugene B. Thomas, Jr., 6828 Melody Lane, Bethesda, Maryland 20014

Leonard M. Trosten, 4825 Fort Sumner Drive, Bethesda, Maryland 20016

Harry H. Voigt, 7500 Summit Avenue, Chevy Chase, Maryland 20015

H. Richard Wachtel, 28 Justamere Drive, Ossining, New York 10562

Gerard P. Watson, 66 82nd Street, Brooklyn, New York 11209

IN WITNESS WHEREOF, we have hereunto set our hands as of the 22nd day of June, 1977.

S/Leon A. Allen, Jr.
Leon A. Allen, Jr.

S/Joseph E. Bachelder, III
Joseph E. Bachelder, III

S/Ernest S. Ballard, Jr.

Ernest S. Ballard, Jr.

S/G.S. Peter Bergen
G.S. Peter Bergen

S/Geoffry D.C. Best
Geoffry D.C. Best

S/David P. Bicks
David P. Bicks

S/Taylor R. Briggs
Taylor R. Briggs

S/Charles N. Burger
Charles N. Burger

S/Thomas E. Burke
Thomas E. Burke

S/Roger D. Feldman
Roger D. Feldman

S/Eugene R. Fidell
Eugene R. Fidell

S/Jacob Friedlander
Jacob Friedlander

S/Donald J. Greene
Donald J. Greene

S/James A. Greer, II
James A. Greer, II

S/John L. Grose
John L. Grose

S/Douglas W. Hawes
Douglas W. Hawes

S/Carl D. Hobelman
Carl D. Hobelman

S/Michael Iovenko
Michael Iovenko

S/James F. Johnson, 4th
James F. Johnson, 4th

S/Ronald D. Jones
Ronald D. Jones

S/Lex K. Larson
Lex K. Larson

S/Grant S. Lewis
Grant S. Lewis

S/Cameron F. MacRae
Cameron F. MacRae

S/Cameron F. MacRae, III
Cameron F. MacRae, III

S/Gerard A. Maher
Gerard A. Maher

S/Sheila H. Marshall
Sheila H. Marshall

S/James G. McElroy
James G. McElroy

S/James P. McGranery, Jr.
James P. McGranery, Jr.

S/Philip Palmer McGuigan
Philip Palmer McGuigan

S/James O'Malley, Jr.

James O'Malley, Jr.

S/J. Michael Parish
J. Michael Parish

S/John A. Rudy
John A. Rudy

S/Paul G. Russell
Paul G. Russell

S/Harold M. Seidel
Harold M. Seidel

S/Charles P. Sifton
Charles P. Sifton

S/Halcyon G. Skinner
Halcyon G. Skinner

S/Joseph S. Strauss
Joseph S. Strauss

S/Samuel M. Sugden
Samuel M. Sugden

S/Eugene B. Thomas, Jr.
Eugene B. Thomas, Jr.

S/Leonard M. Trosten
Leonard M. Trosten

S/Harry H. Voigt
Harry H. Voigt

S/H. Richard Wachtel
H. Richard Wachtel

S/Gerard P. Watson
Gerard P. Watson

State of New York)
) ss:
County of New York)

This certifies that on the 22nd day of June, 1977, before me, the undersigned, a notary public in and for the County of New York, State of New York personally appeared, Leon A. Allen, Jr., Joseph E. Bachelder, III, Ernest S. Ballard, Jr., G.S. Peter Bergen, Geoffry D.C. Best, David P. Bicks, Taylor R. Briggs, Charles N. Burger, Thomas E. Burke, Jacob Friedlander, Donald J. Greene, James A. Greer, II, John L. Grose, Douglas W. Hawes, Carl D. Hobelman, Michael Iovenko, James F. Johnson, 4th, Ronald D. Jones, Grant S. Lewis, Cameron F. MacRae, Cameron F. MacRae, III, Gerard A. Maher, Sheila H. Marshall, James J. McElroy, Philip Palmer McGuigan, James O'Malley,Jr., J. Michael Parish, John A. Rudy, Paul G. Russell, Harold M. Seidel, Charles P. Sifton, Halcyon G. Skinner, Joseph S. Strauss, Samuel M. Sugden, H. Richard Wachtel, Gerard P. Watson, personally known to me to be the persons described in and who executed the foregoing Certificate of Continued Use of Partnership Name and each of them acknowledged to me that he executed the same freely and voluntarily and for the uses and purposes therein named.

In testimony whereof, I have hereunto set my hand and notarial seal this 22nd day of June, 1977.

S/Signature
Notary Public

Richard D. Baxter
Notary Public, State of New York
No. 31-522
Qualified in New York County
Commission Expires March 30,197_

I, S/Phyllis Marriott, a notary public in and for the District of Columbia, do hereby certify that Roger D. Feldman, Eugene R. Fidell, Lex K. Larson, James P. McGranery, Jr., Eugene B. Thomas, Jr., Leonard M. Trosten, and Harry H. Voigt personally appeared before me in said District and, being personally well know to me to be the persons described in and who executed the foregoing Certificate of Continued Use of Partnership Name, each of them acknowledged the same to be his act and deed.

Given under my hand and seal the 12th day of July, 1977.

S/Phyllis Marriott
Notary Public

My commission expires July 14, 1979

CERTIFICATE OF CONTINUED USE
OF PARTNERSHIP NAME OF
LeBoeuf, Lamb, Leiby & MacRae
140 Broadway, New York, New York 10005
(Pursuant to Article 7 of the Partnership
Law of the State of New York)

CERTIFIED COPY ISSUE
FEE PAID
DATED JULY 13, 1977
COUNTY CLERK, N.Y. CO.
BY S/___

CERTIFIED COPY ISSUE
FEE PAID 8
DATED JULY 8, 1987
COUNTY CLERK N.Y. CO.
BY S/DC__

THIS RECORD NOT TO
BE REMOVED FROM
THE COUNTY CLERK'S
OFFICE_____
FILED BY S/_____
INDEXED BY S/___

[FILM 17, PAGES 88255-88265]

FILED '77
JULY 13 - AM 11:25

APPENDIX W - DISCIPLINARY RULE
RULE DR9-102 OF THE LAWYER'S CODE OF PROFESSIONAL RESPONSIBILITY PRESERVING IDENTITY OF FUNDS AND PROPERTY OF OTHERS; FIDUCIARY RESPONSIBILITY; MAINTENANCE OF BANK ACCOUNTS; RECORDKEEPING; EXAMINATION OF RECORDS.

* * *

D. *Required Bookkeeping Records.* A lawyer shall maintain for seven years after the events which they record:

1. The records of all deposits in an withdrawals from the special accounts....
2. A record for special accounts....
3. Copies of all retainer and compensation agreements with clients.
4. Copies of all statements to clients or other persons....
5. Copies of all bills rendered to clients.
6. Copies of all records showing payments to lawyers, investigators or other persons....
7. Copies of all retainer and closing statements....
8. All checkbooks and checkstubs, bank statements....

* * *

G. *Dissolution of a Firm.* Upon the dissolution of any firm of lawyers, the former partners or members shall make appropriate arrangements for the maintenance by one of them or by a successor firm of the records specified in DR9-102(D). ....

H. *Availability of Bookkeeping Records; Records Subject to Production in Disciplinary Investigations and Proceedings.* The financial records required by the Disciplinary Rule shall be located, or made available, at the principal New York State office of the Lawyers subject hereto and any such records shall be produced in response to a notice or subpoena duces tecum issued in connection with a complaint before or any investigation by the appropriate grievance or departmental disciplinary committee, or shall be produced at the direction of the appropriate Appellate Division before any person designated by it. ....

* * *

Rev. 1/4/91

APPENDIX X - LETTER FROM DANIEL J. O'CALLAGHAN TO THE HONORABLE SONIA SOTOMAYOR DATED JULY 29, 1994, WITH MEMORANDUM ORDER ENDORSED THEREON, DATED AUGUST 12, 1994, FILED IN UNITED STATES DISTRICT COURT AUGUST 17, 1994

COPIES MAILED BY
JUDGE SOTOMAYOR'S
CHAMBERS ON 8/16/94

DANIEL J. O'CALLAGHAN
ATTORNEY AT LAW
17 BATTERY PLACE
NEW YORK, N.Y. 10004

212-222-4200

MEMO ENDORSED

TELECOPIER: 212-222-4205

July 29, 1994

The Honorable Sonia Sotomayor
United States District Judge
United States District Court
Southern District of New York
40 Centre Street
New York, New York 10007

RECEIVED
August 4, 1994
Sonia Sotomayor
U.S. District Judge
S.D.N.Y.

Re: *Alison E. Clapp v. LeBoeuf, Lamb, Leiby & MacRae, et al.*, 93 Civ. 8084 (SS)

Dear Judge Sotomayor,

Plaintiff, Alison E. Clapp, writes to the Court to request a pre-motion conference relating to the events of the March 31, 1994 hearing before the Court.

The legal and factual basis for the proposed motion is grounded upon the Court's order dated July 8, 1994 relating to the events recorded at the March 31, 1994 hearing. **Inter alia**, Plaintiff relies upon 28 U.S.C. § 753(b), which refers to the recording of sessions before the Court, and Fed. R. App. P. 10(e), which concerns corrections or modifications of the record on appeal.

It appears appropriate that in consequence of the referenced order, an evidentiary hearing concerning the events of the March 31, 1994 hearing and the transcription thereof be held and/or that the recollection of counsel in this action and that of the approximately 10-15 other persons in attendance during the hearing - particularly counsel upon other matters - be examined.

Respectfully,

MEMO ENDORSED

S/Daniel J. O'Callaghan
Daniel J. O'Callaghan

DJOC: wr
Christopher J. Sullivan, Esq. (by mail)
Abigail I. Peterson, Esq. (by mail)

Seal:
U.S. District Court
Filed
August 17, 1994
S.D.N.Y.

[Handwritten:]
Request denied. There is *no* basis for a hearing. I deny saying what you claim to remember. Even if I had mispoken, which I did not, ~~there is no none~~ I have no relationship with Justice Lebedeff whatsoever. If I have even ever met her, and I don't remember doing so, it was or would have been in passing.

S/Sonia Sotomayor
USDJ 8/12/94